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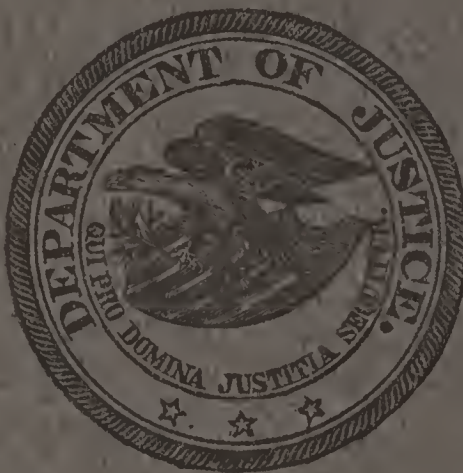






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DEPARTMENT OF JUSTICE.



BRIEF.

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SUITS BROUGHT BY THE UNITED STATES TO CANCEL  
DEEDS TO INDIAN ALLOTMENTS.

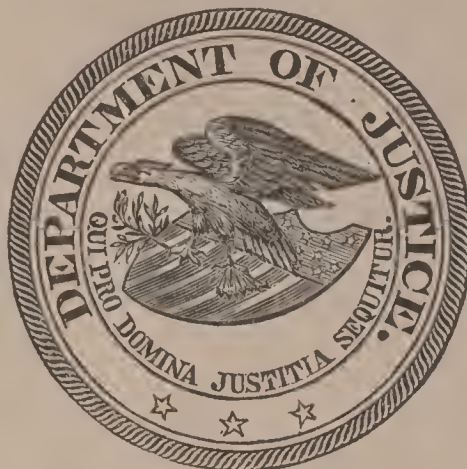


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## DEPARTMENT OF JUSTICE.



## BRIEF.

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NOTE.—This brief is for the use of Government attorneys only. It is believed that its use will result in saving much time and labor which would otherwise be spent in original research.

The authorities cited are freely quoted in order that their applicability to any particular case may be readily determined and for the further reason that easy access to Federal and State reports is not always possible.

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## JURISDICTION OF FEDERAL COURTS.

The judicial power of the United States shall extend to all cases in law and equity \* \* \*; to all controversies to which the United States shall be a party. (Const., Art. III, sec. 2.)

The Federal courts have jurisdiction of all controversies in which the United States is a party, regardless of the amount involved. (*United States v. Sayward*, 160 U. S., 493.)

In that case the specific question was raised, it being contended by the defendant that the jurisdictional amount named in the judiciary act applied to cases brought by the United States. And the Supreme Court, by Mr. Justice Harlan, said that it is clear that a Circuit Court can not, under that statute, take original cognizance of a case arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or of a controversy between citizens of different States, or of a controversy between citizens of a State and foreign States, citizens or subjects, unless the sum in dispute, exclusive of interest and costs, exceeds \$2,000; but he says (p. 497):

But that can not be said of the reference in the statute to a controversy in which the United States are plaintiffs or petitioners, or to one between citizens of the same State claiming lands under grants of different States. \* \* \* The United States being plaintiffs in this action, the Circuit Court had jurisdic-

tion without regard to the value of the matter in dispute.

*United States v. Flourney Live-Stock & Real-Estate Company et al.*, 71 Fed., 578.

In the above case the United States appeared as complainant in equity to oust lessees and conveyees under leases and deeds to lands the lease and alienation of which were prohibited by statute. The court says:

The first question argued by counsel is that of the jurisdiction of the court, based upon the fact that the bill avers that the amount in controversy exceeds \$2,000, which is denied in the answers. If, under the statutes now in force, the restriction as to amount applied to cases where the United States is plaintiff or complainant, the contention would have force; but it does not, and therefore it is immaterial whether the amount in controversy exceeds \$2,000 or not, because this court has jurisdiction of all cases brought by the United States, regardless of the amount involved.

Section 16 of the Oklahoma enabling act of June 16, 1906 (34 Stat., Part I, 276), as amended by the act of March 4, 1907 (34 Stat., Part I, 1286), provides that all civil causes, proceedings, and matters pending in \* \* \* or in the United States Court or United States Court of Appeals in the Indian Territory arising under \* \* \* or in which the United States may be a party \* \* \* shall be transferred to the proper United States Circuit or District Court established by that act.





The judicial power of the United States also extends to all cases in law and equity arising under \* \* \* the laws of the United States, and treaties made, or which shall be made, under their authority. And the Oklahoma enabling act provides for the transfer to the proper United States Circuit or District Courts of all cases arising under the Constitution, laws, or treaties of the United States. (See section 16 of the enabling act.)

#### GUARANTEES OF THE UNITED STATES WITH RESPECT TO THE INDIAN TITLE.

The act of Congress of May 28, 1830 (4 Stat., 411), "An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the river Mississippi," provides, section 3—

that in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States *will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them.*

The treaty with the Choctaws and Chickasaws of June 22, 1855 (11 Stat., 611), provides, Article I, second paragraph, as follows:

And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, etc.

The treaty of August 7, 1856, with the Creeks and Seminoles, provides, Article III (11 Stat., 699):

The United States do hereby solemnly guarantee to the Seminole Indians the tract of country ceded to them by the first article of this convention; and to the Creek Indians, the lands included within the boundaries defined in the second article hereof.

The treaty with the Cherokees of February 14, 1833 (7 Stat., 414), provides, Article I:

The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee, is hereby pledged, of seven millions of acres of land, to be bounded as follows, etc.

**TREATIES ARE THE SUPREME LAW OF THE LAND.**

Indian treaties are the supreme law of the land unless expressly and definitely abrogated. (*Fellows v. Blacksmith et al.*, 19 How., 366.)

On March 3, 1871, Congress declared that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." (R. S., 2079.)

Of recent years the Government of the United States has governed the Indian tribes by acts of Congress instead of controlling them by treaties, they being within the geographical limits of the United States and being necessarily subject to the laws which





Congress may enact for their protection and for the protection of the people with whom they come in contact. (*United States v. Kagama et al.*, 118 U.S., 375.)

THE RELATION BETWEEN THE UNITED STATES AND THE INDIANS IS PECULIAR.

It is scarcely necessary to invite the attention of the courts of the United States, especially those in Oklahoma, to the character of the title under which the Indian holds and occupies his land. That title is and always has been an anomalous one. It is without precedent or analogy. While the Indian allottee may become invested with the rights, privileges, and immunities of citizenship, he may yet, in his property rights, be subject to the control of the Government. This has been declared in the statutes of the United States (see general allotment act of 1887 (24 Stats., 388) and by the Supreme Court of the United States. (*In re Heff*, 197 U. S., 488.)

Mr. Justice Miller said, in *United States v. Kagama* (118 U. S., 375):

The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.

Following the policy of the European governments in the discovery of America towards the Indians who were found here, the colonies before the Revolution, and the States and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to

other nations or peoples without the consent of this paramount authority. When a tribe wished to dispose of its land, or any part of it, or the State or the United States wished to purchase it, a treaty with the tribe was the only mode in which this could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

He also said in the same case, page 383:

It seems to us that this is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, AND WITH IT THE POWER. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

In the Heff case a citizen Indian was held to have been withdrawn from the police power of the Federal





Government, but the court states that this citizenship does not withdraw him from the power and control of the Federal Government in respect of his property rights. Thus, while all Indians in the Indian Territory were made citizens by the general allotment act as amended by the act of March 3, 1901 (31 Stat., 1447), there are restrictions on their title under the general allotment act and under the laws and agreements pertaining to the Five Civilized Tribes.

Attorney-General Miller, on March 12, 1890, advised the President (19 Op. Attorneys-General, 511), as follows:

Notwithstanding the Indians, by taking separate allotments, have made a first and a long step toward civilization and independent citizenship, *yet they are still in a state of pupilage and under the guardianship of the General Government.* Upon the same ground, I am clear that it has not been the intention of Congress, *in any legislation so far*, to put these Indians, who take such separate allotments, entirely upon their own resources or to withdraw the Government's guardianship, supervision, and protection. The fact, if there were no other, that their lands so allotted are made inalienable, that the allottee has no power to cumber or charge the same with debt, would be a clear indication that *Congress had not intended to remit him to courts of law for the protection of those lands*; for it would be worse than idle to expect that a man so untutored, so improvident, so much of a child that he can not be trusted with a control over his property would be able, without any power to charge that property for any purpose, to protect the same in a court of law. In other words, I am entirely clear that it is the duty of the Government to protect

these Indian allottees in the enjoyment of their allotments. *The only question is as to the manner of such protection.* I think \* \* \* it entirely clear that *the statute expressly authorizes the use of troops for the protection of such rights in "the Indian country."* The Supreme Court has repeatedly decided that "Indian country" is all country to which the Indian title has not been extinguished. The Indian title to the lands allotted in these reservations under the act of March 2, 1889, is modified, but I do not think it can be said to be extinguished. In pursuance of treaties with the Indians the lands are partitioned in severalty to the Indians, not because the ordinary Indian title has been totally extinguished but because the Indians have consented to such arrangement. This being so, and in view of the relation of guardianship the Government still bears, and the duty of protection it still owes to these Indians, I have no doubt of the right of the President to use the troops for the protection of these allotments.

Chief Justice Marshall, in the case of *Cherokee Nation v. Georgia* (5 Peters, 1), gives a learned and exhaustive treatise on the status of the Indian with respect to the Federal Government, as he did also in *Worcester v. Georgia* (6 Peters, 515). These cases have been followed and cited throughout all litigation pertaining to the Indian wherever it was desired to emphasize the peculiarity of the relation.

Quoting from the opinion of Chief Justice Marshall in *Cherokee Nation v. Georgia*, *supra*, page 17:

They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must





take effect in point of possession, when their right of possession, ceases. Meanwhile they are in a state of pupillage; their relation to the United States resembles that of a ward to his guardian. They look to our Government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility. These considerations go far to support the opinion that the framers of our Constitution had not the Indian tribes in view, when they opened the courts of the Union to controversies between a State or the citizens thereof and foreign States.

**RESTRICTIONS ON THE POWER TO ALIENATE OR OTHERWISE DISPOSE OF INDIAN LANDS ARE VALID.**

Restrictions on the power of individual Indians to alienate, lease, or otherwise dispose of their lands have been upheld by the Supreme Court of the United States. In *Smith v. Stevens* (10 Wall., 321) Mr. Justice Davis uses this language:

It was considered by Congress to be necessary, in case the reservees should be desirous of relinquishing the occupation of their lands, that *some method of disposing of them should be adopted which would be a safeguard against their own improvidence*; and the power of Congress to impose a restriction on the right of alienation, in order to accomplish this object, can not be questioned. Without this power,

it is easy to see, there would be no way of preventing the Indians from being wronged in contracts for the sales of their lands, and the history of our country affords abundant proof that it is at all times difficult, by the most careful legislation, to protect their interests against the superior capacity and adroitness of their more civilized neighbors.

In *Libby v. Clark* (118 U. S., 250) the Supreme Court declared void a deed made in violation of a treaty of 1862 with the Ottawa Indians (12 Stats., 1239–1240.) The restriction was that “No Indian, except as herein provided, to whom the same (patent) may be issued, shall alienate or encumber the land allotted to him or her in any manner until they shall, by the terms of this treaty, become a citizen of the United States; and any conveyance or encumbrance \* \* \* of the lands allotted to him or her, made before they shall become a citizen, shall be null and void.” It was contended that, as the estate intended to be given to the Indian was one in fee simple, there could be no restriction on the power of alienation. Mr. Justice Miller, at page 255, thus describes the title:

The title conveyed to Hurr by the patent was a *fee simple*; that is, it was all the title or interest in the land. No one shared this title, or had any interest in it, and it descended, or would have descended, to his heirs. The restriction on his right to convey did not deprive the title of the character of a fee simple estate. “An estate in fee simple is where a man has an estate in lands or tenements to him and his heirs forever.” (4 Com. Dig., *Estates*, 1.)





The limitation of the power of sale for five years is not inconsistent with a fee simple estate. Such, also, seems to have been the practice of the Government in other treaties referred to by counsel in their brief. (7 Stat. 348 *et seq.*)

In *Taylor v. Brown* (147 U. S., 640), an Indian took up a homestead under section 15, act of March 3, 1875 (18 Stat., 402), which granted the right to Indians who had abandoned their tribal relations to take up a homestead, with the proviso that "the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or encumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent." The precise question in that case was as to the date on which the five-year period began to run. The court, however, assumed that if a deed were made before the expiration of the period it would be void. At page 646 it is said:

The power of free alienation is incident to an estate in fee simple, but a condition in a grant preventing alienation to a limited extent or for a certain and reasonable time may be valid, and the grantee forfeit his estate by violating it (1 Prest. Est., 477,) and, while such a result does not ensue in transactions with members of a race of people treated as in a state of pupillage and entitled to special protection, (*Pickering v. Lomax*, 145 U. S., 310; *Felix v. Patrick*, 145 U. S., 317, 330,) yet the proviso in question may fairly be held to have been adopted in view of general principles.

In *Beck v. Flournoy Live-Stock & Real-Estate Company* (65 Fed.), at page 35, the court says:

It is competent for a private donor, by deed or other conveyance, to create an estate of that character; that is to say, it is competent for a private person to make a conveyance of real property, and to withhold from the donee, for a season, the power to sell or otherwise dispose of it. And we can conceive of no sufficient reason why the United States, in the exercise of its sovereign power, should be denied the right to impose similar limitations, especially when it is dealing with a dependent race like the Indians, who have always been regarded as the wards of the Government.

In *Smythe v. Henry* (41 Fed., 705), the question was whether citizenship granted to the Indian allottee removed the restriction on alienation. The two were held not to be inconsistent. Restriction on alienation was upheld.

State courts have also consistently upheld the validity of such restrictions. In *Charles Blue-Jacket v. The Commissioners of Johnson County et al* (3 Kans., 299), will be found a very full discussion of the question of the Indian title with relation to the taxing power, particularly as to those lands which have been granted to the Indians with a restriction on the power of alienation. That case arose under the treaty with the Shawnee Indians of May 10, 1854 (10 Stat., 1053), and the restriction was that the land should not be sold or conveyed without the consent of the Secretary of the Interior. The court, at page 321, said:





The interest given, a fee simple taking away the power of alienation except, etc., is precisely what always has been called an "Indian title." (6 Hill, 546 (*Ogden v. Lee*), affirmed, 5 Den., 628.) The same doctrine is recognized in all the decisions, both State and Federal. The Government has habitually given such titles prescribing the same disabilities; it is precisely the title that the European government ever since the discovery of America have conceded to the natives. It was so with England before the Revolution, and it has been so ever since, both under the confederation and under the Constitution of the United States, and has been practiced by the United States, giving Indians the same title to their *new* homes which they held to their original or native country.

After reviewing the restrictions on alienation contained in the several treaties, the court, at page 325, says:

It is obvious from the treaty itself that it was not the intention of the Government to part with the control over these lands except in certain cases where the Government might deem it for the best interest of the Indian to consent to the sale of them or a portion of them. Allowing the Indians to make selections of head rights and giving them patents therefor, was done with the view of habituating the Indians to the idea of individual property, and fixing them down to one place and destroying their inclination to roam about and live a hunter's life. To secure these objects and to carry out this policy it was just as necessary for the Government to retain the entire control of the property as before the treaty. Indeed, without retaining this control

the Government could not carry out this policy nor fulfill their treaty obligations with the Shawnee tribe of Indians. For these guards and restrictions spoken of in the act of 3d of March, 1859, are intended for the benefit of the Indians, and it is so expressed.

In *Sheldon v. Donohoe* (40 Kans., 346), a Chippewa Indian gave a deed to his allotment taken under the Chippewa treaty, which provided that the land so taken "shall not be alienated in fee, leased, or otherwise disposed of, except to the United States or to members of said band of Indians" (12 Stat., 1105). The deed was declared void. Quoting from the opinion of the court at page 349:

Sheldon (the grantee of the Indian) was incapable of taking the title to the land then, and has been ever since that time. By the paramount Federal law he was prohibited from taking the title, and therefore he can not indirectly build up one by adverse possession, estoppel, or any statute of limitations. (*Stevens v. Smith*, 2 Kans., 243; *Stone v. Young*, 4 Kans., 17; *Pennock v. Monroe*, 5 Kans., 578.) Cited in *Schrimscher v. Stockton*, 183 U. S., 290.

By the constitution and laws of the State of New York all contracts for the purchase or sale or occupation of land made with any of the tribes of Indians within that State without the previous consent of the State are illegal and void. It was so held in *St. Regis Indians v. Dunn* (19 Johnson (N. Y.), 126).





In *Ex parte Forbes* (1 Dill., 363), the court says:

In the case of the Kansas Indians (5 Wall., 737) the United States Supreme Court, in speaking of the Shawnees, says: "As long as the United States recognizes their tribal character they are under the protection of treaties and the laws of Congress and their property is withdrawn from the operation of State laws." There can be no question of the applicability of this language to the suit in Wyandotte County. The Secretary of the Interior has never approved the deeds under which petitioners claim and the deeds are entirely void until approved by that officer. Until they are so approved the lands of the Shawnees are as wholly beyond the jurisdiction of the State courts as if it were situated beyond its geographical limits.

In *Clark v. Akers* (16 Kans., 166), which was referred to and commented upon in *Sheldon v. Donohoe* (*supra*), the court, at page 171, says:

We agree with the court below, that "a deed made by an Ottawa Indian at any time prior to July 16, 1867, without the consent of the Secretary of the Interior, was absolutely void, and could not create even an equitable interest in the land in favor of the grantee, even though he had paid the purchase money and taken actual possession." Or, as stated in the second set of findings: "A deed made by an Ottawa Indian, of land allotted and patented to him under the treaty of 1862, conveying such land to another Ottawa Indian, at any time prior to July 16, 1867, without the consent of the Secretary of the Interior, WAS ABSOLUTELY VOID, and could not create even an equitable estate in the lands in favor of the grantee, even though he had paid the purchase money." And therefore we think the

said deeds "E" and "F" were wholly void. They were void, not because of any accident, or mistake, or oversight, or irregularity in their execution, but they WERE VOID BECAUSE OF A WANT OF POWER IN EARLY TO ALIENATE OR INCUMBER HIS LAND IN ANY MANNER OR FORM EXCEPT WITH THE CONSENT OF THE SECRETARY.

In *McGannon v. Straightlege* (32 Kans., 524), the treaty with certain Indians (10 Stat., 1082), provided that no conveyance of allotments should be made without the approval of the Secretary of the Interior. The allottee executed a deed to the defendant's grantor without approval. The grantee named in this deed and his grantees remained in possession for fifteen years. Afterwards a patent was issued to the allottee. The allottee's heir executed a deed of conveyance to the plaintiff, which was approved by the Secretary. The plaintiff brought an action in the nature of ejectment against the first grantee. It was held that neither the action nor the plaintiff's title to the land was barred by any statute of limitation. Quoting from the opinion at page 525:

It is admitted that the title held by Pa-kan-giah was simply an Indian title, and that the deed executed by him to Baptiste Peoria was utterly null and void. It was void for the reason that it was executed without authority, and in violation of the terms of said treaty, and Pa-kan-giah had at the time nothing but a naked allotment of the land to convey.





Other cases in which conveyances to land upon which there was a restriction were held to be absolutely void are,

*Farrington v. Wilson*, 29 Wis., 383.

*Scoffins v. Grandstaff*, 12 Kans., 468.

In *Schrimpscher v. Stockton* (183 U. S., 290), a deed made by a Wyandotte Indian in violation of the restriction was held to be void, and it was further held that the statutes of limitation do not run against the Indian or his heirs as long as the condition of incompetency remains.

But even if this specific question had not been judicially determined time and time again, the doctrine laid down by the Supreme Court of the United States in *Irvine v. Marshall et al.* (20 How., 558) that "all the lands in the Territories, not appropriated \* \* \* before they were acquired, are \* \* \* the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles, as the Government may deem most advantageous" would apply. And, again, in *Bagnell v. Broderick* (13 Pet., 436), "Congress has the sole power to declare the dignity and effect of titles emanating from the United States."

And in *United States v. Holliday* (3 Wall., 407), Mr. Justice Miller, speaking for the court, says, at page 419:

If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress. This control

extends, as we have already shown, to the subject of regulating the liquor traffic with them. This power residing in Congress, that body is necessarily supreme in its exercise. This has been too often decided by this court to require argument, or even reference to authority.

Neither the constitution of the State nor any act of its legislature, however formal or solemn, whatever rights it may confer on those Indians or withhold from them, can withdraw them from the influence of an act of Congress which that body has the constitutional right to pass concerning them. Any other doctrine would make the legislation of the State the supreme law of the land, instead of the Constitution of the United States, and the laws and treaties made in pursuance thereof.

If authority for this proposition, in its application to the Indians, is needed, it may be found in the cases of the *Cherokee Nation v. The State of Georgia*, and *Worcester v. The State of Georgia*.

And such restrictions are not inconsistent with an estate in fee simple.

*Libby v. Clark*, 118 U. S., 250, *supra*.

*Pickering v. Lomax*, 145 U. S., 310.

*Taylor v. Brown*, 147 U. S., 640, *supra*.

And this power of the United States to regulate the mode of conveyance of lands belonging to the United States, or to the Indians, or to both, is free and independent of the provisions of any State statutes.

*Irvine v. Marshall et al.*, 61 U. S., 558.

*Bagnell v. Broderick*, 38 U. S., 436.

*Mayne v. Veale*, 20 Kans., 374.





SUBSEQUENT REMOVAL OF RESTRICTION DOES NOT  
VALIDATE THE VOID INSTRUMENT.

Nor does the removal of the restriction subsequent to the date of the void deed or lease validate the same. As authority for this, we have the Supreme Court of the United States, *Smith v. Stevens*, 10 Wall., 321. Under the act of May 26, 1860 (12 Stat., 21), the reservees had no authority to sell the lands without the assent of the Secretary of the Interior. A deed was made by a reservee and subsequently, on July 17, 1862, Congress removed the restriction (12 Stat., 628), and it was contended that the deed was thereby validated. Quoting from the opinion of Mr. Justice Davis, at page 326:

It needs no argument or authority to show that the statute, having provided the way in which these half-breed lands could be sold, by necessary implication, prohibited their sale in any other way. The sale in question not only contravened the policy and spirit of the statute, but violated its positive provisions.

It appearing, then, that by the treaty and law in force at the date of the deed, Victoria Smith had no capacity to alienate her land, and the authority to sell being vested in the Secretary of the Interior, and there being no evidence that this officer ever authorized the sale, or in any manner consented to it, it follows that the sale was void, and that the deed conveys no title to the purchaser.

It is hardly necessary to say that a joint resolution passed nearly two years after this transaction, removing the restriction on alienation, can not relate back and give validity to a conveyance which, when executed, was void, nor have we any reason to suppose that Con-

gress contemplated that any such effect would be claimed for its legislation on the subject.

*Smith v. Stevens* is distinguishable from *Lomax v. Pickering* (173 U. S., 26), and *Lykins v. McGrath* (184 U. S., 169). In those cases the approval had not been given at the time the deed was executed, but the deeds subsequently received the necessary approval and the approval was, of course, held to relate to the date of the deeds.

**ALLOTMENT IN SEVERALTY IS MERELY A MODIFICATION  
OF THE INDIAN TITLE.**

The allotments in severalty do not extinguish the title under which the reservations exist; at most, there is but a modification of it.

On March 12, 1890, Attorney-General Miller advised the President (19 Op. Attorneys-General, 511) to that effect. At page 512 the Attorney-General says:

The Supreme Court has repeatedly decided that "Indian country" is all country to which the Indian title has not been extinguished. The Indian title to the lands allotted in these reservations under the act of March 2, 1889, is modified, but I do not think it can be said to be extinguished. In pursuance of treaties with the Indians the lands are partitioned in severalty to the Indians, not because the ordinary Indian title has been totally extinguished, but because the Indians have consented to such arrangement. This being so, and in view of the relation of guardianship the Government still bears, and the duty of protection it still owes to these Indians, I have no doubt of the right of the President to use the troops for the protection of these allotments.





Until the restriction upon alienation has been removed the United States *alone* is authorized to deal with the members of the tribe in respect to their allotted property; and so long as the allotment is encumbered by any condition it remains under the treaty guarantee to protect and keep the reservation for the use of the tribe. (*United States v. Mullin*, 71 Fed., 682, *supra*.)

THE UNITED STATES HAS THE POWER AS PARENS PATRIÆ AND IT IS ITS DUTY UNDER THE INDIAN TREATIES TO INVOKE THE AID OF COURTS TO SET ASIDE DEEDS, MORTGAGES, ETC., TO INDIAN LANDS DECLARED VOID BY ITS TREATIES AND LAWS.

Manifestly, the reason for restraining the alienation of the property of Indian allottees is that they are likely to be overreached in the business world. Hence, they are not permitted to alienate or encumber their lands, except under such conditions as Congress may impose, until they shall have reached such a state of intelligence and experience that their interests may be safely intrusted to them. How incongruous would it be if they were left to their own disposition to bring and maintain suits in the courts with respect to the property upon which these restrictions have been placed! If the Indian is unfit to negotiate for the sale of his property he is unfit to enforce his rights in the courts. And until the political department of the Government clearly indicates its desire to leave the Indian to his own devices its power of protection remains. It should be remembered that it is only by virtue of the consent of the Government that the

Indians can ever sell or lease their lands. The title flows from the Government and, unless permission to lease or sell can be found in its statutes, the power does not exist.

In *United States v. Kagama* (118 U. S.), at page 384, Mr. Justice Miller says:

From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, *and with it the power*. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen \* \* \* The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

The Kagama case involved the constitutionality of the Indian Appropriation Act of March 3, 1885 (23 Stats., 385), giving jurisdiction to the courts of the Territories of certain crimes committed by Indians within the Territories and also giving jurisdiction in like cases to courts of the United States for the same crimes committed on an Indian reservation within a State of the Union. The constitutionality of the act was upheld.





In *Beck v. Flourney Live-Stock & Real-Estate Company* (65 Fed.), at page 37 it is said:

The company deliberately took the chances of violating the law, in the belief, no doubt, that the Government of the United States would be powerless to recover possession of the demised premises, if possession was actually acquired, except by bringing a multitude of suits in ejectment. That is the position now assumed by the appellee. It asserts with great confidence that the Government must be treated as a private land owner; that it can only recover the possession of the leased lands by bringing suits in ejectment.

It will be observed from this language that the lessees of these Indian lands never questioned the right of the Federal Government to appear as party complainant on behalf of the Indians.

In *United States v. Boyd* (68 Fed.), the court, at page 579, says:

All that is decided is that the Government of the United States has not yet ceased its guardian care over them, (the Indians) nor released them from pupilage. The Federal courts can, still, in the name of the United States, adjudicate their rights. Nor is this without precedent. The American seaman, born a citizen of the United States, or naturalized as such, has extended over him the guardian care of the Government, and is a ward of the nation. The statute books abound with acts requiring his contracts to be looked into by officers appointed for that purpose, and every precaution is taken to guard him against fraud, oppression, and wrong. (R. S., 4554 *et seq.*)

And on page 580 the court says:

The case of the Cherokee trust funds (117 U. S., 288), \* \* \* decides that this Eastern Band of Cherokee Indians is not a part of the Nation of Cherokees with which this Government treats, and that they have no recognized separate political existence; but, at the same time, their distinct unity is recognized, and the fostering care of the Government over them as such distinct unit. This being so, the United States have the right in their own courts to bring such suits as may be necessary to protect these Indians.

The foregoing is by Judge Simonton. And Judge Dick, in the same case at page 581, after stating that the preliminary question presented in the case is whether the United States had the power to appear as a party plaintiff to rescind a contract procured by means of undue influence and fraud, said:

In the suit before us the United States do not claim any right that encroaches upon any of the sovereign powers, duties, and obligations of this State. They claim no police power over the Indians as citizens of the United States \* \* \*. They only insist upon the right to appear as a plaintiff in a suit in equity instituted in their Circuit Court to invoke the jurisdiction of such court in behalf of their wards, to obtain such relief as may be granted upon the well-recognized principles of equity jurisprudence. THEY APPEAR AS SOVEREIGN OF THIS DEPENDENT INDIAN COMMUNITY, AS PARENS PATRIAE OF THIS HELPLESS AND INJURED RACE, not yet invested with the full rights of American citizenship, and as GUARDIAN, BY TREATY OBLIGATIONS, OF THESE IGNORANT AND INJUDICIOUS WARDS, to control





their transactions about lands acquired by the treaty money.

After referring to the act of July 27, 1868, which transferred the care of the Indians from the Treasury Department to that of the Interior, he concludes that the Secretary of the Interior and the Commissioner of Indian Affairs, in the exercise of their supervisory power, were given, by implication, the power to do everything necessary to exercise it, and he then says:

I am of opinion that, wherever a power is conferred and a duty imposed by statute, everything necessary to accomplish the legislative purpose is given by implication. "A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter." (*United States v. Freeman*, 3 How., 556.)

In *United States v. Flourney Live-Stock & Real-Estate Company* (69 Fed., 890), the suit was brought by the United States to cancel leases to lands the alienation of which had been forbidden in the grant and in the patent, and also to lands which were taken up under the general allotment act to which the Government retained the legal title in trust for the allottee. Quoting from the opinion of Judge Shiras, page 890:

The theory of the bill is that the United States is a trustee for the Indians, and holds the title of the lands in trust for them, AND, BY FORCE OF THE TREATIES WITH THEM, IS CHARGED WITH THE PERFORMANCE OF CERTAIN DUTIES TOWARDS THEM, and that there exists a trust

relation of a high and delicate character, and that, for the proper performance of these trust duties, it is necessary that the defendants should not only be ousted from the possession of the leased lands, but that the defendants should be restrained, etc. \* \* \* The bill seeks the aid of the court, as a court of equity, to assist in the proper performance of trust duties and obligations, AND TO PROTECT THE RIGHTS OF THE INDIANS, etc.

And, at page 892, he says:

By the express terms of the treaties made with these Indians, the United States assumed the duty of preserving the reservations for the use, occupancy, and benefit of the Indians, and this duty is still incumbent upon it; and it is also the fact that the United States still recognizes the continued existence of the Omaha and Winnebago tribes. In the absence of direct Congressional action on the subject, it is for the executive branch of the Government, acting through its appropriate channels, to determine when a given tribe of Indians, or any portion thereof, has so far advanced in civilization, has so far abandoned the habits of savage, or semi-savage life, and has so far adopted the customs, laws, and mode of life obtaining among the white people, that the United States can safely, and in justice to the inhabitants of the region wherein they dwell, as well as with safety and in justice to the Indians themselves, and with due regard to the treaty obligations assured to them, terminate all further control over such Indians, and leave them to the protection only of the general laws of the country.

And again, on page 893:

It can not be questioned that the power of the United States Government over the Indian tribes is paramount and supreme.





(*United States v. Kagama*, 118 U. S., 375.) If the United States, by a treaty duly made with an Indian tribe, has assumed a given duty or obligation to the Indians, the power exists to properly perform this duty within the boundaries of the States, as well as within the Territories. The power to enforce its laws, and the treaties made by it, in pursuance of the provisions of the Constitution, is paramount and supreme, and rests upon every foot of soil within the national boundaries. (*Ex parte Siebold*, 100 U. S., 371; *In re Neagle*, 135 U. S., 1; *In re Debs*, 158 U. S., 564.)

\* \* \* By the express terms of the treaty made with the Indians on the 8th of March, 1865, the United States solemnly stipulated "to set apart for the occupation and future home of the Winnebago Indians, forever, all that certain tract," etc. If the executive branch of the Government deems it necessary, for the proper performance of this treaty stipulation with the Indians, to forbid the occupancy of these lands by white men, it has the right so to do, especially in view of the fact that, in all the legislation touching the same, Congress has uniformly prohibited the alienation of the lands and has expressly declared that all contracts between the Indians and persons not native members of the tribe shall be wholly null and void \* \* \*; and it is clearly the duty of the United States to prevent the alienation of the lands during the period named, and to preserve them for the use and occupancy of the Indians.

Judge Shiras concluded that the leases of the allottees were void; that the occupancy of the lands by the lessees was wholly inconsistent with the purposes for which the lands were set apart and with the object of the Government in providing for the allotment

in severalty; that such occupancy results in antagonizing the authority and control of the Government over the Indians; and that the United States, through the executive branch thereof, has the right to invoke the aid of the courts to cancel the leases and to compel the lessees to yield the possession thereof and to restrain them from endeavoring to obtain or retain such possession. (Page 894.)

After the demurrer in *United States v. Flourney Live-Stock & Real-Estate Company* had been overruled the case came on for hearing on bill and answer. (*United States v. Flourney Live-Stock & Real-Estate Company*, 71 Fed., 576.) It will be remembered that in this case some of the leases were of lands allotted under the Winnebago treaty upon which there was a restriction on alienation and as to which no permission to lease had been given by Congress, while the other allotments were taken up under the general allotment act. As before pointed out, the court made no distinction between these two classes of allotments as to the capacity in which the United States appeared as party complainant. The court, in a sharp opinion, granted all the relief prayed for in the bill. At page 579 Judge Shiras says:

I further hold that these reservations continue to be Indian reservations; that the United States has never yet been released from the treaty stipulations and obligations by which it assumed to preserve these lands for the use and benefit of the Indians; that the United States holds the title of these lands charged with the trust created by the treaties





in question, and it is its duty to do whatever is necessary to protect the Indians in the proper use and occupancy thereof; that the power and right in the United States to do whatever is necessary for the fulfillment of its treaty duties, trusts, and obligations towards the Indians rests upon every foot of soil and upon every individual within the boundaries of the reservations, and this power and right is paramount and supreme.

He further says:

Nor can there be found any proper authority for leasing any portions thereof, (the reservation) excepting under the control of the Interior Department; and as it appears that the leases held by the defendants were not taken under the rules and regulations of the Department, but in total disregard thereof, and as it further appears that the defendants held possession, not under any right, license, or permission granted by the United States, but in defiance of the orders, rules, and regulations of the Indian Office and of the Interior Department, I further hold that THE UNITED STATES HAS THE RIGHT TO INVOKE THE AID OF THE COURT to remove the defendants from the possession of the lands in the bill described and also to restrain them from procuring the execution of other leases from the Indian allottees, except in the mode provided in the acts of Congress, and under the control and supervision of the Department of the Interior.

In *United States v. Mullin* (71 Fed., 682, *supra*), it was held that the fact that a part of the Indian reservation has been allotted in severalty does not release the United States from its obligation to protect the

Indians in the possession and occupancy thereof. Beginning page 684 it is said:

It seems to me clear, beyond question, that the duty and obligation rests upon the executive branch of the Government of the United States to protect the Winnebago Indians in the possession, use, and occupancy of the reservation set apart for them by the treaty of March 8, 1865. The treaty, by express terms, imposed this duty upon the United States, and the fact that part of the reservation has been allotted in severalty to a portion of the tribe does not release the United States from this treaty obligation. These allotments are not yet perfected. The acts of Congress providing therefor expressly restrict all right of alienation, and all right of contract between the Indians and the whites, for a period of twenty-five years. It can not be known whether all or any of the allottees in severalty will remain on the lands assigned for the period of twenty-five years, and it may be that, by abandonment, the allottees may fail to perfect an alienable title to the lands allotted them. Such failure, however, would not deprive the tribe, as a whole, of their right to the reservation; and it would still be the duty of the United States, under the terms of the treaty, to protect the tribe in the use and occupancy of the reservation.

And again at the bottom of page 685 it is said:

A right of occupancy thus acquired by an Indian tribe in virtue of treaty stipulations is a right that can only be dealt with by the United States, as is expressly held in *Beecher v. Wetherby* (95 U. S., 517) and *United States v. Thomas* (151 U. S., 577); and it is not claimed that either the executive or legislative branch of the Government has, by direct action, in





any way terminated the right of the Winnebago Indians to the reservation in question, or that by convention with the Indians, or in any other mode, the United States has sought to relieve itself from the duty it assumed, in the treaty of March, 1865, of protecting these Indians in the possession of the reservation lands. It being true, then, that the Federal Government is still charged with this duty, it follows that the executive branch of the Government has full power and authority to do whatever may be necessary for the proper performance of this duty.

And again, at page 686, he says:

From these considerations it follows that the National Government, by the terms of the treaty entered into with the Winnebago Indians, is charged with the obligation of protecting the Indians in the use and occupancy of the reservation lands; that this duty has not been terminated by the allotment of the lands in severalty; that the executive department of the Government is charged with the duty to do whatever may be necessary to protect the Indians in the use and occupancy of these lands, AND TO OUST INTRUDERS THEREFROM.

The Supreme Court of the United States, in the Matter of *Heff* (197 U. S., 488), distinctly upholds the right of the Government to enforce and protect any condition which it attaches to any of its Indian grants. It was contended by the Government in that case that a restriction on the alienation of allotted lands withheld the allottee from the police power of the State even though the allottee had become a

citizen of the United States, and upon this point Mr. Justice Brewer, at page 508, said:

But it is said that the Government has provided that the Indians' title shall not be alienated or encumbered for twenty-five years, and has also stipulated that the grant of citizenship shall not deprive the Indian of his interest in tribal or other property, but these are mere property rights and do not affect the civil or political status of the allottees. In *United States v. Rickert* (188 U. S., 432) we sustained the right of the Government to protect the lands thus allotted and patented from any encumbrance of State taxation. Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted), and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants. THIS IT MAY DO BY APPROPRIATE PROCEEDINGS IN EITHER A NATIONAL OR A STATE COURT. But the fact that property is held subject to a condition against alienation does not affect the civil or political status of the holder of the title. (Cited and affirmed in *McKay v. Kalyton*, 204 U. S., 469.)

And in *United States v. Rickert* (188 U. S., 432), where the question was raised as to whether the United States had such an interest in a suit as to restrain the assessment of taxes on lands taken up under the act of 1887, the Supreme Court, by Mr. Justice Harlan, at page 444, said:

In view of the relation of the United States to the real and personal property in question, as well as to these dependent Indians still under national control, and in view of the injurious effect of the assessment and taxation





complained of upon the plans of the Government with reference to the Indians, it is clear that the United States is entitled to maintain this suit. No argument to establish that proposition is necessary.

It thus appears that by its treaty obligations to protect the Indians in the enjoyment of the reservation, the allotments in severalty being merely a modification of the tribal title, the United States has the right and it is its duty to keep clear the title to the lands as defined by its laws, treaties, and agreements; and that it is also its duty so to do under its relation as guardian of the Indians.

#### THE UNITED STATES HAS CONSTITUTIONAL AUTHORITY TO SUE.

But there is another principle upon which it may sue. It is that great attribute of a sovereign government, by which it is enabled to discharge its duty, by both the exercise of physical force and the peaceable method of appeal to its courts in matters especially committed to its care and control. It is that power which exists independently of any property rights or pecuniary interest and which was upheld by the Supreme Court of the United States in the famous case of *In re Debs* (158 U. S., 564). No extended statement of the facts in that case is necessary. It will be remembered that a general strike by which non-union men were prevented from doing their work threatened to paralyze the entire commerce of the country. The United States, realizing its duty and power in matters of interstate commerce, appealed to

the Circuit Court for the Northern District of Illinois for an injunction restraining the union men from interfering with the operation of trains carrying interstate commerce and the mails. The Circuit Court, basing its jurisdiction upon the act of July 2, 1890 (c. 647, 26 Stat., 209), "An act to protect trade and commerce against unlawful restraints and monopolies," sent forth its edict, which all but a few obeyed. Those few were held in contempt and sent to jail. Their petition for *habeas corpus* is the case above cited. Every jurist and lawyer remembers how the Supreme Court, brushing aside the act of 1890, upon which the Circuit Court based its jurisdiction, all consideration of property rights in the mails and of pecuniary interest, declared the inherent right of the Government to invoke the aid of the courts in the discharge of its duty respecting interstate commerce and post-offices and post-roads, matters especially committed to its care and control by the Constitution.

Upon what Constitutional provisions is the proposition that the United States may bring these suits in its own name as sole plaintiff by reason of its attributes as a sovereign government based? They are:

He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. (Constit., Art. II, sec. 2, cl. 2.)

The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States, \* \* \*  
(Constit., Art. IV, sec. 3, cl. 2.)





The Congress shall have power \* \* \* to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. (Constit., Art. I, sec. 8, cl. 3.)

In making treaties and agreements with the Indians, it has seen fit to exercise its power to dispose of property belonging to the United States, to wit, the public domain; and it is under this power that it disposes of public lands generally; hence its power to invoke the aid of the courts to rescind patents to land obtained in a manner not permitted by its statutes. The right of the Attorney-General to prosecute suits of that character was upheld in—

*United States v. San Jacinto Tin Co.*, 125 U. S., 273.

*United States v. Minor*, 114 U. S., 233.

*Moore v. Robbins*, 96 U. S., 530.

*United States v. Hughes*, 11 How., 552.

*United States v. Atherton*, 102 U. S., 372.

*Moffat v. United States*, 112 U. S., 24.

*Mullan v. United States*, 118 U. S., 271.

The first-mentioned case was cited and commented upon in the Debs case, which will now be analyzed and quoted in part. The opinion is by Mr. Justice Brewer and will be found in 158 U. S., beginning at page 577. On page 578 he says:

First. What are the relations of the General Government to interstate commerce and the transportation of the mails? They are those of direct supervision, control, and management. While under the dual system which prevails with us the powers of government are distributed between the State and the Nation, and while the latter is properly styled a government of enumerated powers, yet within the

limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the State.

And, after speaking of the sufficiency of the Federal Government to discharge the great powers assigned to it, he quotes Chief Justice Chase in *Lane County v. Oregon* (7 Wall., 71, 76):

We hold it to be an incontrovertible principle, that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

And at page 580 he says:

Under the power vested in Congress to establish post offices and post roads, Congress has, by a mass of legislation, established the great post office system of the country, with all its detail of organization, its machinery for the transaction of business, defining what shall be carried and what not, and the prices of carriage, and also prescribing penalties for all offenses against it.

Obviously these powers given to the National Government over interstate commerce and in respect to the transportation of the mails were not dormant and unused. Congress had taken hold of these two matters, and by various and specific acts had assumed and exercised the powers given to it, and was in the full discharge of its duty to regulate interstate commerce and carry the mails. The validity of such exercise





and the exclusiveness of its control had been again and again presented to this court for consideration.

The learned justice concludes his discussion of the right of the Government to exercise physical force on page 582 thus:

The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the Army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws.

Passing to the question of the exercise of peaceable means, he holds that the same rights exist with reference to invoking the aid of judicial tribunals for the purpose of discharging its duty with respect to interstate commerce, and at page 583 he says:

So, in the case before us, the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention. Indeed, it is more to the praise than to the blame of the Government that, instead of determining for itself questions of right and wrong on the part of these petitioners and their associates and enforcing that determination by the club of the policeman and the bayonet of the soldier, IT SUBMITTED ALL THOSE QUESTIONS TO THE PEACEFUL DETERMINATION OF JUDICIAL TRIBUNALS, and invoked their consideration and judgment as to the measure of its rights and powers and the correlative obligations of those against whom it made complaint. And it is equally to the credit of the latter that the judgment of those tribunals was by the great body of them respected, and

the troubles which threatened so much disaster terminated.

The learned justice then discusses the question whether the United States must have a property or a pecuniary interest in order to ask the aid of the courts, and, after deciding that the United States unquestionably has a property in the mails, his opinion proceeds, page 584:

We do not care to place our decision upon this ground alone. Every Government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, AND IT IS NO SUFFICIENT ANSWER TO ITS APPEAL TO ONE OF THOSE COURTS THAT IT HAS NO PECUNIARY INTEREST IN THE MATTER. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court. This proposition in some of its relations has heretofore received the sanction of this court. In *United States v. San Jacinto Tin Co.* (125 U. S., 273, 285) was presented an application of the United States to cancel and annul a patent for land on the ground that it was obtained by fraud or mistake. The right of the United States to maintain such a suit was affirmed, though it was held that if the controversy was really one only between individuals in respect to their claims to property the Government ought not to be permitted to interfere.

The opinion then cites the case of *United States v. American Bell Telephone Company* (128 U. S., 315),





which was a suit brought by the United States to set aside a patent for an invention on the ground that it had been obtained by fraud or mistake, and it was claimed that the United States, having no pecuniary interest in the subject-matter of the suit, could not be heard to question the validity of the patent. But this contention was overruled, the court quoting from the San Jacinto case. Mr. Justice Brewer then states at page 586:

It is obvious from these decisions that while it is not the province of the Government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, AND ARE IN RESPECT OF MATTERS WHICH BY THE CONSTITUTION ARE ENTRUSTED TO THE CARE OF THE NATION, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the Government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

The National Government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a Government to remove obstructions from the highways under its control.

And finally the opinion is concluded on page 600 thus:

We enter into no examination of the act of July 2, 1890 (c. 647, 26 Stat., 209), upon which the Circuit Court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, BUT SIMPLY THAT WE PREFER TO REST OUR JUDGMENT ON THE BROADER GROUND WHICH HAS BEEN DISCUSSED IN THIS OPINION, BELIEVING IT OF IMPORTANCE THAT THE PRINCIPLES UNDERLYING IT SHOULD BE FULLY STATED AND AFFIRMED.

The Debs case, then, holds that while the United States is a government of enumerated powers, it has full attributes of sovereignty within the limits of those powers; that the powers thus conferred are not dormant, but have been assumed and put into practical exercise by Congressional legislation; that while it may be competent for the Government to exercise force to compel obedience to its laws passed in pursuance of the powers thus granted, it is equally within its competency to appeal to its civil courts in order to carry out its policies as declared in those laws; and that no special grant of jurisdiction to the courts is required.

The Supreme Court of the United States has declared:

The power over the public lands is vested in Congress by the Constitution without limitation. (*United States v. Gratiot et al.*, 14 Pet., 526.)





And again:

All lands in the Territories, not appropriated \* \* \* before they were acquired, are \* \* \* the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles, as the Government may deem advantageous. (*Irvine v. Marshall*, 20 How., 558.)

Congress has the sole power to declare the dignity and effect of titles emanating from the United States. (*Bagnell v. Broderick*, 13 Pet., 436.)

In disposing of its lands under homestead, stone and timber, coal land, and other laws, Congress has specified the conditions under which they may be acquired and what persons may acquire them. If they are obtained under other conditions or by other persons, we have seen that the Government possesses the inherent right to set aside the muniments of title and to purify the record. In disposing of its lands to the Indians it has declared that a qualified title shall go to the Indian and that it shall go no further. The difference is one of fact only. Who, then, can deny the existence of the power with respect to the second class of cases?

There may be a question as to whether the disposition of lands to the Indians is under the treaty-making power or under the power to dispose of territory and other property. But whether it is under one or both is immaterial. The same power exists as to both; they are both subjects committed to the care and control of the National Government, and the same power exists to command obedience to its

laws and to nullify violations thereof as was declared by the Supreme Court in the Debs case with respect to interstate commerce, post-offices, and post-roads.

Moreover, Congress has distinctly recognized the right of the United States to bring suits of the character herein contemplated. By the act of May 27, 1908, "An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes," it is provided by the last paragraph of section 6 as follows:

Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases, or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act.

To summarize, the right of the United States to sue in its own name as sole plaintiff may be based upon three distinct principles:

- (1) The power to enforce its treaty obligations;
- (2) The relation of guardian which it bears to the Indians; and
- (3) The inherent constitutional power as laid down in *In re Debs*.





CASES WHICH ESTABLISH THE RIGHT OF THE UNITED STATES, BY ITSELF, TO INVOKE THE AID OF THE COURTS TO RESCIND ACTS DECLARED VOID BY THE INDIAN TREATIES AND LAWS.

A series of decisions in the United States courts, growing out of a scheme on the part of a concern known as the Flourney Live Stock and Real Estate Company to acquire immense tracts of land in the Winnebago Indian Reservation, has placed beyond question the right of the United States to use its military power and to invoke the aid of the courts as the sovereign power to prevent the possession and occupation of Indian allotments in violation of its laws.

In order to have a proper understanding of these cases it should be understood that some of the allotments to which leases were obtained were made on May 26, 1871, under the fourth section of the act of February 21, 1863 (12 Stat., 658), and the treaty of March 8, 1865. The act of February 21, 1863, authorized the President of the United States "to assign to and set apart for the Winnebago Indians a tract of unoccupied land beyond the limits of any State," and to remove the Indians from Minnesota "and to settle them upon the lands which may be assigned to them" under the provisions of the act. It provided for allotments in severalty of lands "which lands, when so allotted, shall be vested in said Indian and his heirs, *without the right of alienation*, and shall be evidenced by patent." The act further provided, section 5, that said Indians "shall be deemed incapable of making any valid civil contract with any per-

son other than a native member of their tribe without the consent of the President of the United States.”

Others of the allotments were made under the general allotment act of February 8, 1887 (24 Stat., 388), section 5 of which provides:

That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; provided, that the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void.

The general allotment act was amended February 28, 1891 (26 Stat., 794), and provided for the leasing of Indian lands, both allotted and tribal, under the conditions specified in paragraph 3 of the act, which is as follows:

*That whenever it shall be made to appear to the Secretary of the Interior that, by reason of*





*age or other disability, any allottee under the provisions of said act, or any other act or treaty can not personally and with benefit to himself occupy or improve his allotment or any part thereof the same may be leased upon such terms, regulations, and conditions as shall be prescribed by such Secretary, for a term not exceeding three years for farming or grazing, or ten years for mining purposes; provided, that where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior.*

It will thus be seen that in the case of the allotments held under the act of 1863 there was an absolute restriction on alienation, and the Indians were to be incapable of making any valid civil contract without the consent of the President. And under the general allotment act the United States was to hold the land in trust for the Indians for twenty-five years, and any conveyance of the land or any contract touching the same should be absolutely null and void. These restrictions were modified under the amendment of 1891 to the extent indicated in paragraph 3, but only when the conditions under which the lands might be leased were made to appear to the Secretary of the Interior and the contract or lease received his approval.

The Flournoy company obtained leases to lands allotted, both under the act of 1871 and the act of 1887, to the extent of 37,000 acres, which contracts and leases were never submitted to the Secretary of the Interior for his approval. In point of fact, there was no attempt to secure the leases within the limitations in the amendment of 1891. The company secured leases and contracts from every Indian it could reach.

It is an important fact that throughout the entire litigation the courts, in considering the rights of the United States in the premises, made no distinction between lands taken under the act of 1871, wherein there was a grant with a restriction on alienation, and the act of 1887, wherein the legal title was retained by the United States in trust for the allottees.

BECK v. FLOURNOY LIVE-STOCK & REAL-ESTATE COMPANY,  
65 FED., 30:

In this case the Flournoy Company sought to enjoin Beck, an army officer and acting Indian agent, from interfering with the complainant's possession of the lands to which it had obtained leases. Beck had been directed by the Commissioner of Indian Affairs to cause notices to be served upon the company and upon all other persons holding leases for land within the reservation that the leases were void and would not be recognized by the Department of the Interior and that the leased premises must be vacated by a certain time. Beck was proceeding to execute this order and to serve such notices when the bill was filed.





The case at *nisi prius* is not reported. However, the defendant was enjoined and took the case to the Circuit Court of Appeals for the Eighth Circuit, and the decision of the Circuit Court of Appeals is found as above cited. That court reversed the trial court in an opinion rendered by Judge Thayer, in which he held:

(1) That the citizenship bestowed on the Indians was in no way inconsistent with the restriction upon their title to their lands and that the leases obtained by the Flourney Company were utterly void;

(2) That the injunction granted by the trial court was erroneous; and

(3) That, as the Flourney Company had evidently embarked upon the business of securing the leases with knowledge of their illegality, and in reliance upon the difficulties the Government would meet in getting rid of them, a court of equity would not interfere, at the instance of such wrongdoer, to restrain any action the Government might take to vindicate its rights, but would leave it to seek damages at law for whatever injury it might sustain.

UNITED STATES v. FLOURNOY LIVE-STOCK & REAL-ESTATE COMPANY, 69 FED., 886:

This was the next case. The United States filed its bill against the Flourney Company to recover the possession of lands upon which the defendants had entered, to restrain them from entering upon other lands and from further contracting with the Indians about their lands. It named as defendants

the Flourney Company and all persons holding subleases under it and other persons who had obtained similar leases from Indian allottees to the number of 231. There was a demurrer to the bill upon the following grounds:

(1) That the plaintiff had a full and adequate remedy at law;

(2) That the bill was multifarious in that it was exhibited against a number of defendants for several and distinct and independent matters; and

(3) That the allegations of the bill did not show the plaintiff entitled to the relief sought.

The court held:

(1) That the leases were void, citing *Beck v. Real-Estate Company* (65 Fed., 30);

(2) That equity has jurisdiction of a suit brought by the United States against persons who have illegally secured leases of Indian lands and taken possession thereof and to restrain such persons from inducing the Indians to make further leases and from interfering with the Indian agent in the performance of his duties, since the remedy by action in ejectment would be inadequate; and

(3) That the bill is not multifarious although exhibited against persons holding under leases from different lessors and having no common interest in the suit, since the United States have one common interest touching the matter of the bill arising out of the trust relation existing between them and the Indians in regard to the lands.





## PILGRIM ET AL. v. BECK ET AL. (69 FED., 895).

This was a suit similar to that of *Beck v. Flourney Company* (*supra*). The complainants were sublessees of the Flourney Company and sought to enjoin Beck in the manner in which the company had previously attempted. The court, through Judge Shiras, denied the relief asked, holding the leases absolutely void, and further holding that neither such leases nor occupancy and planting of crops upon the lands gave the occupants any right to restrain the officers of the Government from removing them from such lands, following the prior cases.

UNITED STATES v. FLOURNOY LIVE-STOCK & REAL-ESTATE COMPANY (71 FED., 576, *supra*).

This is the case hereinbefore cited, which was heard on demurrer to the bill and which demurrer was overruled. The case then came before Judge Shiras on the merits and is reported as above. This case distinctly upholds the right for which the Government contends. Judge Shiras held:

(1) That the citizenship of the Indians does not render null and void as to them or as to the remaining members of their tribes restrictions upon alienation of their lands contained in the acts of Congress, nor terminate the right and duty of the United States to preserve the reservation lands for the use and benefit of the Indians, following *Beck v. Real-Estate Company*, 65 Fed., 30; *United States v. Real-Estate Company*, 69 Fed., 886; and *Pilgrim v. Beck*, 69 Fed., 895.

(2) That lapse of time in the allotment of their reservations in severalty does not terminate the tribal relations of Indians nor remove them from the supervision and control of the Interior Department of the Government;

(3) That the Government has the right to invoke the aid of the court to remove from the lands of Indians under its supervision and control persons who have intruded thereon under unauthorized leases from the Indians and to restrain such persons from securing such leases from them; and

(4) That the court had jurisdiction of the suit without regard to the amount in controversy because the United States was the complainant.

Other cases in which the United States has sued in its own name and upon its own initiative for the purpose of enforcing and commanding obedience to its laws respecting Indian property are:

UNITED STATES *v.* PAINE LUMBER COMPANY (206 U. S., 467).

In that case the United States sued the purchaser of timber cut and sold by Indian allottees on the Stockbridge and Munsee Indian Reservation. The land was inalienable and the Government sued to recover the price of the timber. The courts held that the Indians had the legal right to cut and sell the timber for the support of themselves and their families, but the right of the United States to bring the suit was not questioned either in the trial court or in the Supreme Court of the United States.





UNITED STATES ET AL. v. BOYD ET AL. (68 FED., 577).

This case shows clearly the peculiar relation between the United States and the Indians because the Indians involved in that case, the Eastern Band of Cherokees in the State of North Carolina, did not obtain the lands on which they reside from the United States; they were bought by the band itself from private holders in North Carolina. A contract was made by the Indian council with the defendants for the sale of timber on these lands owned and occupied by the Indians. The United States appeared as complainant, the bill asserting the *paramount authority and guardianship of the United States* over the Eastern Band of Cherokee Indians. It is true that there also appeared as complainants several Cherokee Indians, suing in their own behalf, etc., but the jurisdiction of the Federal court was assailed on the ground that the United States was not a proper party. Judges Dick and Simonton both filed opinions upholding the right of the Government to bring suits on behalf of the Indians with respect to their property rights whenever it saw fit to do so. Indeed, many years before serious complications grew out of the purchase of these lands by these Indians, and the Congress of the United States, by a provision in the act of July 15, 1870 (16 Stats., 362), made it the duty of the district attorney and the Attorney-General of the United States to institute and prosecute suits at law or in equity in the district or circuit courts of the United States for adjusting all matters in controversy. Here was a case where the United States appeared by

reason of its paramount authority over and its duty as sovereign of a weak and helpless race in respect to property in relation to which there had never been any negotiation between it and the Indian tribe. It is true that those Indians had not, at that time, become citizens of the United States, but, as will be hereinafter shown, the Government is not relieved of this authority and duty by reason of citizenship on the part of the Indians.

UNITED STATES v. MULLIN, (71 FED., 682).

This was an indictment against John H. Mullin, under section 5398, Revised Statutes, for unlawfully resisting service of a legal writ. Captain Beck, acting Indian agent of the Winnebago Reservation, had ordered an Indian policeman to remove George Manning from an allotment, and Mullin attempted to obstruct and resist the officer in the service of the writ placed in his hands by Captain Beck. Judge Shiras, in that case, held:

(1) That the Government is not relieved from its duties of guardianship and protection of the members of an Indian tribe assumed by treaty with such tribe in consequence of the Indians becoming citizens of the United States; and

(2) That the Federal Government is charged with the duty of protecting the Indians in the use and occupancy of the reservation lands *whether allotted in severalty or not.*





## IN RE CELESTINE (114 FED., 551).

This was a petition for *habeas corpus* by Mrs. Josie Celestine and Doctor Buchanan, United States Indian agent in charge of the Tullalip Reservation, for the purpose of inquiring into the cause of the detention of Annie George, an infant child of Mrs. Celestine, who was an Indian woman. Judge Hanford held that the Federal court had no jurisdiction merely because an Indian who was a ward of the Government was a party, and that his personal rights were involved; that there is no statute authorizing an Indian agent to sue for the benefit or protection of the Indians under his charge; and that an Indian who became a citizen under the act of February 8, 1887, has the right to sue in his own name in suits involving his personal or domestic rights. But the court expressly upheld the right of the United States to appear as a party to sue, even in a case of the character of the one before him. After stating that the Indian agent had no authority in law to sue, the court said, page 552:

On the contrary, it has been decided in several cases that it is the right and duty of the Government itself to maintain such suits as may be necessary for the protection of the rights of the Indians.

## UNITED STATES ET AL. v. WINANS ET AL. (73 FED., 72).

In this case the United States, together with certain Indian plaintiffs, brought suit for an injunction to restrain the defendants from interfering with fishery rights of the Yakima Indians. Here it was

decided that the United States has the right, as guardian and trustee of a tribe of Indians, to bring a suit to protect the rights secured by their treaty.

UNITED STATES v. RICKERT (188 U. S. 432).

This was a suit brought by the United States to restrain the collection of taxes alleged to be due Robert County, S. Dak., on lands taken up under the general allotment act. It was there held that the United States had such an interest in the matter as to entitle it to maintain the suit. Quoting from the opinion of the court, which was by Mr. Justice Harlan, at page 437:

If, as is undoubtedly the case, these lands are held by the United States in execution of its plans relating to the Indians—without any right in the Indians to make contracts in reference to them or to do more than to occupy and cultivate them—until a regular patent conveying the fee was issued to the several allottees, it would follow that there was no power in the State of South Dakota, for State or municipal purposes, to assess and tax the lands in question until at least the fee was conveyed to the Indians. These Indians are yet wards of the nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of





this dependent race, and to accomplish beneficent objects with reference to a race of which this court has said that “from their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.” (*United States v. Kagama*, 118 U. S., 375, 384.)

UNITED STATES v. SAUNDERS ET AL., 96 FED., 268.

This was a suit brought by the United States against the defendants to annul a deed given by an Indian of the Coeur d'Alene tribe to Saunders, purporting to convey title to the grantor's homestead. The suit was brought upon the theory that the act of January 18, 1881 (21 Stat., 315), relating to homesteads acquired by Indians, applied to Indians generally. The court held that the act of January 18, 1881, applies only to the Winnebago Indians. But the right of the United States to sue by itself to annul the deed was upheld. It is true that the court observed that the bill was styled a “bill to quiet title to lands,” and the court questioned the right to sue to remove a cloud on the title to property of which the defendant was in possession; but it upheld the right of the United States to sue to have the deed surrendered for cancellation. The distinction made between the forms of relief will be hereinafter commented upon in the discussion of the requisites for removal of cloud from the Indian title.

CITIZENSHIP OF THE ALLOTTEE DOES NOT PRECLUDE THE UNITED STATES FROM EXERCISING ITS POWER OF PROTECTION NOR AFFECT RESTRICTIONS ON THE INDIAN TITLE.

By the act of February 8, 1887 (24 Stat., 388, sec. 6), it is provided:

And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether such Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States *without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.*

And by the act of March 3, 1901 (31 Stat., 1447), this act was amended by inserting after the words "civilized life" the words "and every Indian in Indian Territory."

In *United States v. Mullin* (71 Fed., 682) it was contended that as the general allotment act of 1887 conferred citizenship upon the allottees, the Government was relieved from all protection of the allotted property. Quoting from the court's opinion:

Much stress was laid in the argument upon the fact that, under the acts of Congress pro-





viding for the allotment of lands in severalty, the allottees become, and are declared to be, citizens of the United States; it being assumed that, so soon as the Indian becomes a citizen of the United States, the Government is relieved from all treaty obligations to him: The conclusion is not derivable from the premise. Certainly, the Government is as much obliged, to its own citizens, to perform its duties and obligations, as it is to those who are not citizens. The question is, Does the duty exist? If so, it should be performed, to citizen or noncitizen, alike. It not unfrequently happens that, in cases of the acquisition of territory by conquest or purchase, the Government binds itself to confer citizenship upon the inhabitants of the acquired territory, and also to recognize and protect the title held by them; and it has never been held that the acquisition of the status of citizenship deprives the individual of his right to insist that the treaty obligation, providing for the recognition and protection of the title to property, should be observed and fulfilled. For illustration, suppose an act declaring that all Indians within the State of Nebraska should henceforth be citizens of the United States; would such enactment, and the consequent acquisition of citizenship by the Indians, terminate all treaty obligations on part of the United States to them, and thereby relieve the United States from the duty of protecting the Indian in the use and occupancy of the lands reserved and set apart for him? The United States would still hold the title of the lands in trust for the Indians, and the conditions of the trust would not be changed by the fact that the Indian had become a citizen. It must therefore be true that the United States, notwithstanding the fact that portions

of the Winnebago Reservation have been allotted in severalty to a portion of the tribe, or if it were true that the entire reservation had been allotted in severalty, is yet bound, by its treaty stipulation, to protect the Indians, whether citizens or wards of the nation, in the use and occupancy of the reservation lands which have never yet been opened to occupancy by the whites.

In *United States v. Flourney Live-Stock & Real-Estate Company* (71 Fed., 576), the same contention was made, but the court held that the grant of citizenship did not discontinue the right and duty of the Government to rescind leases forbidden by its statutes (p. 578-579).

Since the amendment of 1901, granting citizenship to Indians in the Indian Territory, the Supreme Court of the United States has recognized the guardianship of all Indians in the Territory.

*Cherokee Nation v. Hitchcock*, 187 U. S., 308.

*Lone Wolf v. Hitchcock*, 187 U. S., 567.

*United States v. Rickert*, 188 U. S., 432.

*Farrell v. United States*, 110 Fed., 942.

In *Cherokee Nation v. Hitchcock* (*supra*), the nation sought to enjoin the Secretary of the Interior from leasing oil lands under the act of June 20, 1898. The question was whether this was a valid exercise of the power vested in Congress with respect to the Indian tribes. The decision was in 1902. Mr. Justice White declared the Indians were still subject to the control of the Government in their property matters. At page 307 it is said:

There is no question involved in this case as to the taking of property; the authority which





it is proposed to exercise, by virtue of the act of 1898, has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the Government, even though the members of the tribe have been invested with the status of citizenship under recent legislation.

In *Lone Wolf v. Hitchcock* (*supra*) Mr. Justice White quoted from the *Kagama* case, in which it was held that the Indians were wards of the nation, and reaffirmed the doctrines therein laid down.

In *United States v. Rickert* (*supra*), which was decided in 1903 and which involved the taxation of allotments taken up under the general allotment act, the court, at page 437, by Mr. Justice Harlan, declared that the Indians are yet wards of the nation. It should be borne in mind that the Supreme Court in deciding these cases had before it the general allotment act of 1887, in which all Indians who took up lands thereunder were specifically declared to be citizens of the United States.

Nor does the grant of citizenship affect in any manner the inhibition against leasing or selling. In *Smythe v. Henry* (41 Fed., 705) citizenship had been conferred upon Junaluska, a Cherokee chief. A grant of land was also made to him in fee without power of alienation. In an action to cancel the deed made by Junaluska and to quiet the title it was contended that the restriction on alienation was inconsistent with the grant of citi-

zenship, but the contention was overruled by the court.

In *United States v. Boyd et al.* (68 Fed.), at page 583, *Smythe v. Henry* was approved and followed, as was *Eells v. Ross* (64 Fed., 417). In the latter case it was held that the citizenship granted by the general allotment act had no effect upon the restriction on the alienation of lands by allottees under the treaty with the Puyallup Indians. In that case Circuit Judge McKenna, speaking for the Circuit Court of Appeals, said, page 420:

The act of 1887, which confers citizenship, clearly does not emancipate the Indians from all control, or abolish the reservations.

And, after discussing the power of the Government to impose restraints on alienation, the court said, page 420:

From its relations to the title, and from the terms of the treaty, we think the Government had the power to make such conditions, and that they were not destroyed by making the Indians citizens. Such effect can not be deduced from the act of 1887, for, if Congress could do so, Congress did explicitly clog the title with a condition of nonalienation for 25 years, and absolutely nullified all contracts made, touching the same, before the expiration of such time.

And the court cited *Smythe v. Henry* with approval. The court also cited *In re Coombs* (127 Mass., 278), wherein it was held that it was competent for the legislature to continue the guardianship of Indians by the State after they had been made citizens.





In *United States v. Flourney Company* (69 Fed., 886), the court, at page 891, says:

The argument in support of the demurrer, in effect, goes upon the theory that citizenship of the allottee is inconsistent with any restraint upon the right of alienation of the lands allotted in severalty. The error of this assumption is clearly shown in the opinion of the court of appeals in the case of *Real-Estate Co. v. Beck*, already cited. The instances in which the United States has conferred an interest in lands upon citizens, but subject to a restraint upon alienation, are numerous, and it has never been held that a restriction upon the right of alienation is so inconsistent with citizenship that the two can not coexist. The right to alienate lands is denied to minors, and yet, during their minority, they may be citizens of the United States, with all the privileges and rights conferred thereby. It is to be expected that in the effort to advance the Indian from his semisavage condition, and to change his tribal condition into individual citizenship, many anomalous situations will arise, which must be viewed in the light of all the legislation upon the same subject, including the treaties made with the several tribes.

In that case it was further urged that as under the laws of the State of Nebraska Indians to whom allotments had been made had the right to vote and hold office, the Government of the United States no longer owes them any duty of protection. But the court said that in the act of 1887, by which the Indians were made citizens, it finds the express exception that such citizenship shall exist WITHOUT

IN ANY MANNER IMPAIRING OR OTHERWISE AFFECTING THE RIGHT OF ANY SUCH INDIANS TO THE TRIBAL OR OTHER PROPERTY.

And in *United States v. Flourney Company* (71 Fed., 576) it was contended that the citizenship granted by the act of 1887 removed all restrictions upon the right of alienation contained in the acts of Congress under which the allotments were made. At page 578 the court said:

Thus it appears that the questions which are decisive of the case now before the court are questions of law, the pivotal point being whether conferring citizenship upon the Indian allottees freed the lands allotted to them from the restrictions contained in the acts of Congress upon the right of alienation, and terminated all right of control on part of the United States over the reservations, the lands therein, and the Indians occupying the same. Nothing has been adduced by way of argument or authority which leads me to conclude that the views expressed in the opinion rendered upon the demurrer to the bill in this case and in the case of *Pilgrim v. Beck* (69 Fed., 895) are erroneous, and I shall not attempt to enlarge the argument therein contained, or to repeat the substance thereof at the present time. Relying upon these opinions and that of the Circuit Court of Appeals for this circuit in the case of *Beck v. Real-Estate Co.* (12 C. C. A., 497; 65 Fed., 30), I HOLD THAT THE FACT THAT THE INDIAN ALLOTTEES ARE DECLARED TO BE CITIZENS OF THE UNITED STATES DOES NOT RENDER NULL AND VOID AS TO THEM, OR AS TO THE REMAINING PORTION OF THE OMAHA AND WINNEBAGO TRIBES, THE RESTRICTIONS UPON THE RIGHT OF ALIEN-





ATION CONTAINED IN THE SEVERAL ACTS OF CONGRESS UNDER WHICH ALLOTMENTS IN SEVERALTY HAVE BEEN MADE OF PORTIONS OF THESE RESERVATIONS; AND IT THEREFORE FOLLOWS, AND MUST BE SO HELD, THAT THE SEVERAL LEASES UNDER WHICH THE DEFENDANTS CLAIM TITLE AND RIGHT OF POSSESSION ARE WHOLLY VOID.

In *Taylor v. Brown* (147 U. S., 640) the restriction on alienation was enforced against conveyances made by a Sioux Indian who had abandoned his tribal relations and taken the oath of allegiance to the United States and had entered a homestead under the law.

Even if, by the common law, citizenship and restriction on the alienation of property were inconsistent (which is not the case), if it clearly appeared from an act of Congress that both citizenship and restriction were to exist, the courts would be bound to give effect to such intention. The general allotment act grants citizenship and at the same time provides for a restriction on alienation. And, even if they were inconsistent, which should prevail? It would be going far indeed to say that the amendment contained in the act of March 3, 1901, by which all Indians in Indian Territory were made citizens, was intended to repeal every provision of law by which Indians in the Territory are declared to be incapable of selling and leasing their lands. Such a claim is too far beyond reason to be entertained. This point seems to be entirely without merit.

THE CONTINUANCE OF THE PROTECTION AND POWER OF THE UNITED STATES IS A POLITICAL QUESTION AND THE COURTS ARE BOUND BY THE ATTITUDE OF CONGRESS.

If it be asked how long this power in the Government is to continue, the answer is, just so long as the political department of the Government so indicates. That the relations between the Government and the Indians are purely a political question has always been held. (*United States v. Holliday*, 3 Wall., 407.) And the attitude of the political department as to questions properly within its functions is controlling on the courts. (*Mississippi v. Johnson*, 71 U. S., 475.)

In that case Mr. Chief Justice Chase said:

The Congress is the legislative department of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department.

See also *Georgia v. Stanton* (6 Wall., 50).

The courts are bound by the attitude of Congress relating to all political questions. (*United States v. Lynde*, 11 Wall., 632.)

In *Worcester v. Georgia* (6 Peters, 350), bottom paging, Mr. Justice McLean, at page 400, said:

It will scarcely be doubted by any one, that, so far as the Indians, as distinct communities, have formed a connection with the Federal Government, by treaties; that such connection is political \* \* \*. So long as treaties and laws remain in full force, and apply to Indian nations, exercising the right of self government, within the limits of a State, the





judicial power can exercise no discretion in refusing to give effect to those laws, when questions arise under them, unless they shall be deemed unconstitutional.

In *United States v. Boyd et al.* (*supra*) the court said, page 580:

There is another consideration. In determining the attitude of the Government towards the Indians—all Indians,—the courts follow the action of the executive and other political departments of the Government, whose more special duty it is to determine such affairs. (*United States v. Holliday*, 3 Wall., 419.)

In *Cherokee Nation v. Hitchcock* (187 U. S., 294), at page 308, it is said:

We are not concerned in this case with the question whether the act of June 28, 1898, and the proposed action thereunder which is complained of, is or is not wise, and calculated to operate beneficially to the interests of the Cherokees. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts.

In *Lone Wolf v. Hitchcock* (187 U. S., 553) the court uses this language, at page 565:

Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government.

See also *Farrell v. United States* (110 Fed., 942).

And in the absence of specific legislation, the executive branch of the Government has the power to say how long its protection shall be extended to the Indians. In *United States v. Flourney Company* (69 Fed.), at page 892, it is said:

In the absence of direct Congressional action on the subject, it is for the executive branch of the Government, acting through its appropriate channels, to determine when a given tribe of Indians, or any portion thereof, has so far advanced in civilization, has so far abandoned the habits of savage or semisavage life, and has so far adopted the customs, laws, and mode of life obtaining among the white people, that the United States can safely, and in justice to inhabitants of the region wherein they dwell, as well as with safety and in justice to the Indians themselves, and with due regard to the treaty obligations assured to them, terminate all further control over such Indians, and leave them to the protection only of the general laws of the country.

Congress has never withdrawn the support of the Government from the Five Civilized Tribes. The reservations are continued, and appropriations made for the support and maintenance thereof. More than this, Congress has specifically declared that the Government shall investigate leases and deeds to Indian lands made in violation of its statutes and shall take steps in the courts to cancel the same. By the act of March 3, 1905 (33 Stat., Part I, 1060), it is provided:

It shall be the duty of the Secretary of the Interior to investigate, or cause to be investigated, any lease of allotted land in the Indian Territory which he has reason to believe has





been obtained by fraud, or in violation of the terms of existing agreements with any of the Five Civilized Tribes, and he shall in any such case where in his opinion the evidence warrants it refer the matter to the Attorney-General for suit in the proper United States court to cancel the same, and in all cases where it may appear to the court that any lease was obtained by fraud or in violation of such agreements, judgment shall be rendered canceling the same upon such terms and conditions as equity may prescribe, and it shall be allowable where all parties in interest consent thereto to modify any lease and to continue the same as modified.

And the act of March 1, 1907 (34 Stat., Part I, 1026) contains this provision:

To enable the Secretary of the Interior to investigate or cause to be investigated any lease of allotted land in the Indian Territory which he has reason to believe has been obtained by fraud or in violation of the terms of existing agreements with any of the Five Civilized Tribes, as provided by the act approved March third, nineteen hundred and five, ten thousand dollars.

And this appropriation was renewed by the act of April 30, 1908 (Indian appropriation act), thus:

To enable the Secretary of the Interior to investigate or cause to be investigated any lease, power of attorney, contract, deed, or agreement to sell any allotted land which he has reason to believe has been obtained by fraud, or in violation of the terms of existing agreements with any of the Five Civilized Tribes, as provided by the act approved March third, nineteen hundred and five, ten thousand dollars.

And it may be here said that the act of March 3, 1905, clearly implies the assumption on the part of Congress that the United States itself would bring the suits contemplated thereby, for it is said “and it shall be allowable in cases where the parties in interest consent thereto to modify any lease, etc.” What parties were intended? Certainly not the Indian himself who had already consented to the lease.

Even then, if Congress were not itself continuously declaring that the Government shall protect the Indian in his rights, the Attorney-General of the United States as part of the executive department, may, until Congress has clearly indicated that the protection shall no longer be extended, bring actions in the name of the United States to rescind Indian contracts and deeds which are declared void by its statutes. (*Flournoy case*, 69 Fed., 892.)

#### REQUISITES OF A BILL TO REMOVE A CLOUD FROM A TITLE

NATURE OF REMEDY AND CHARACTER OF INSTRUMENT TO  
BE CANCELED—STATE STATUTES MAY BE ENFORCED IN  
FEDERAL COURTS.

There are several equitable remedies which involve the principle of *quia timet* which, according to the text writers, have been more or less confused by the courts. This confusion has doubtless arisen from their cognate character. They are actions to remove a cloud, to quiet title, bills of peace, and a miscellaneous class of cases of that character which have been commonly spoken of as actions *quia timet*. Suits under the equity jurisdiction to rescind deeds have





also been held to involve this principle, and have added somewhat to the confusion. At the outset it may be well to distinguish between these several classes of equitable remedies as far as may be possible, bearing in mind that many writers have interchangeably spoken of these forms of remedies, and, indeed, in several instances have treated of them in a single chapter, applying the text to the several classes of cases generally.

A cloud on a title has been defined to be an outstanding claim or incumbrance which, if valid, would impair or affect the title of the owner of a particular estate, and which apparently and on its face has that effect, but which can be shown by extrinsic proof to be invalid or inapplicable to the estate in question. (17 Pl. & Pr., 277.)

A cloud upon title is a title or incumbrance apparently valid, but in fact invalid.

Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he can not immediately maintain or protect his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and canceled, or by making any other decree which justice or the rights of parties may require. (2 A. & E., 1st ed., 298.)

Such bills will lie without a previous establishment of the plaintiff's title at law, for it may often happen, as where the plaintiff's possession has not been disturbed, that he can maintain no action at law to test the defendant's claim. (17 Pl. & Pr., 279.)

In *Frost v. Spitley* (121 U. S., 552), which was a bill to remove a cloud brought by the owner of an equitable title, Mr. Justice Gray speaks of the object of a "bill to remove a cloud," but also speaks of it as a bill "to quiet the possession of real estate." Whether he intended by this to indicate that bills to remove clouds and bills to quiet title are one and the same thing is not clear. However, the object of the bill in question is thus stated by him at page 556:

Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title and to quiet the possession to real estate, is to protect the owner of the legal title from being disturbed in his possession or harassed by suits in regard to that title; and the bill can not be maintained without clear proof of both possession and legal title in the plaintiff.

In 17 Pl. & Pr., 277, it is said:

A bill to quiet title, strictly considered, is substantially a bill of peace, and will generally lie only in favor of a person in possession who has already established his title by one or more successful contests at law. It is most frequently used to prevent a multiplicity of suits.

Story's Equity, paragraph 826, thus distinguishes bills to remove clouds and bills of peace:

A bill *quia timet*, or to remove a cloud upon the title of real estate, differs from a bill of peace in that it did not seek so much to put an end to vexatious litigation respecting the property as to prevent future litigation by removing existing causes of controversy as to its title. It was brought in view of anticipated wrongs or mischiefs and the jurisdiction of the court





was invoked because the party feared future injury to his rights and interests.

In *Holland v. Challen* (110 U. S., 15), which was a bill in equity to quiet title under the Nebraska statute, Mr. Justice Field speaks of the bill as “a bill of peace.” Quoting, beginning page 18:

“The statute of Nebraska enlarges the class of cases in which relief was formerly afforded by a court of equity in quieting the title to real property. It authorizes the institution of legal proceedings not merely in cases where a bill of peace would lie, that is, to establish the title of the plaintiff against numerous parties insisting upon the same right, or to obtain repose against repeated litigation of an unsuccessful claim by the same party; but also to prevent future litigation respecting the property by removing existing causes of controversy as to its title, and so embraces cases where a bill *quia timet* to remove a cloud upon the title would lie. (Adams on Equity, 202; Pomeroy’s Equity Juris., Sec. 248; *Stark v. Starrs*, 6 Wall., 402; *Curtis v. Sutter*, 15 Cal., 259; *Shepley v. Rangely*, 2 Ware, 242; *Devonsher v. Newenham*, 2 Schoales & Lef., 199.)

In *Whitehead v. Shattuck* (138 U. S., 146), which was a suit in equity to quiet the title of the plaintiff to certain real property in Iowa, the judgment was based upon *Holland v. Challen*, *supra*.

In 17 Pl. & Pr., at page 279, it is said:

This distinction between bills to quiet title and to remove cloud is not universally recognized and bills to remove a specified cloud are frequently spoken of as bills to quiet title and *vice versa*. In fact, there is great conflict in the decisions as to the proper classification of the various kinds of bills *quia timet*.

If there is any distinction between these several classes of remedies, it might be found in the fact that in one of them, bills of peace, the equitable jurisdiction to prevent a multiplicity of suits is involved and that in order to maintain such a bill the complainant must have established his title at law.

Considering these several actions as a unit, there is also much conflict in the adjudicated cases upon two points. The first is as to whether the muniment of title which threatens to prejudice the peaceful enjoyment of the complainant's property is an instrument void on its face or one requiring extrinsic evidence to show its invalidity. The weight of authority, however, is to the effect that if the instrument is void on its face it constitutes no cloud which could in anywise embarrass the complainant. (17 Pl. & Pr., 284.)

In 18 Pl. & Pr., at page 759, it is said:

There is a strong line of authority from courts of the highest respectability supporting the view that equity has jurisdiction to decree the cancellation of a deed, bond, note, or other obligation, whether the instrument is or is not void at law, or whether it is void for matter appearing on its face or *aliunde*, but it would seem that according to the weight of authority equity has no jurisdiction to rescind or cancel an instrument which is void on its face.

The doctrine that the instrument must not be void on its face has been severely questioned and criticised. As said in 17 Pl. & Pr., at page 286:

The justice and equity of this rule are more apparent than real, for even an instrument void on its face as a matter of law, or whose





invalidity will necessarily appear in proceedings to enforce any rights under it, seriously diminishes the market value of the property affected. In a few cases instruments void on their face have been canceled as clouds on title, and these cases would seem to be supported by the better reason.

In *Maloney v. Finnegan* (38 Minn., 70) the court, while following the weight of authority, severely arraigned the doctrine. The court said that the old reason assigned for the rule was that if the defects appeared on the face of the instrument no reason existed for equitable interference, because it could not be said that any cloud is cast upon the title. He refers to the comment of Mr. Pomeroy, vol. 3, sec. 1399, that the rule is based wholly on verbal logic and not upon any principle of justice or common sense and that it leads to the strange scene, almost daily witnessed in the courts, of defendants urging that the instruments under which they claim are void and of judges deciding that the court can not interfere, while, from a business point of view, every intelligent person knows that the instrument is a serious injury to the plaintiff's title and that the judge himself who thus repeats the rule would neither buy the property nor lend a dollar upon its security.

The second point is as to whether the complainant must allege that he is in possession of the land and prove it. It is impossible to reconcile the cases on this point. The relief has been granted to complainants in possession, where no one is in possession, and, as an exception to the general rule, where the defendant is in possession, under some circumstances.

But these differences and conflicts, with the exception of the question of possession, have been rendered of small importance by the passage of State statutes, enabling and remedial in character, which clearly define the requisites of bills involving the principle of *quia timet*.

The general purpose and effect of these statutes is to extend the remedy to cases in which by the settled rules of equity no relief could be had, either because the adverse claim is not such as to constitute a technical cloud, or because the plaintiff is not in a situation to invoke the equitable jurisdiction.

*Holland v. Challen*, 110 U. S., 18.

*Whitehead v. Shattuck*, 138 U. S., 146.

*Bardon v. Land and River Improvement Company*, 157 U. S., 327.

*Ormsby v. Ottman*, 85 Fed., 492.

These statutes have dispensed with the question as to whether the instrument sought to be canceled is void on its face and with other questions which arose under the original equity jurisdiction.

The statutes may now be divided into two classes, those in which possession by the plaintiff is a requisite, and those in which it is not.

The equity jurisdiction to quiet title, independent of statute, was only invoked by a plaintiff in possession, holding the legal title, when successive actions at law, all of which had failed, were brought against him by a single person out of possession, or when many persons asserted equitable titles against a plaintiff in possession holding the legal or an equitable





title. The action has been greatly extended by statute, and in many States is the ordinary mode of trying disputed titles. The States adopting such statutes may be separated into two classes, the first and most numerous class requiring the plaintiff to be in possession, and the second allowing the action to be brought by a plaintiff either in or out of possession. In almost every instance the statutes, either by express terms or through broad and general language, allow the action to be maintained by persons having equitable titles; in other words, a plaintiff need not have a legal title. (Pomeroy's Equity Jurisprudence, vol. 4, sec. 1396.)

And when the action is under a statute providing for the determination of adverse claims, a bill, petition, or complaint, substantially averring the statutory requisites, is sufficient. (17 Pl. & Pr., 326; *Paton v. Lancaster*, 38 Iowa, 494.)

The bill is generally short, and if it is alleged in substance that the plaintiff is the owner and in possession of certain described land and that the defendant claims an estate or interest therein but has none, a cause of action under the statute is stated. (17 Pl. & Pr., 326; *Durell v. Abbott*, 44 Pac. Rep., 647.)

The statute in force in the present State of Oklahoma is that of the old Territory of Oklahoma which was taken literally from the statutes of Kansas. It will be found in the Statutes of Oklahoma, 1893, paragraph 4491, at page 864, and is as follows:

An action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate,

or interest therein, adverse to him, for the purpose of determining such adverse estate or interest.

Remembering the requisites of an action of this character under the original rules of equity as laid down in *Frost v. Spitley* (121 U. S., 552), the extension of the remedy by the statute is at once apparent. And the question was naturally raised as to whether the courts of the United States by entertaining cases under the statute thereby attempted to enlarge their equity jurisdiction. But the Supreme Court of the United States has determined this question in the negative and upon the very safe ground that while the statutes are an extension of an equitable right they create no new equitable jurisdiction.

A very full discussion of the effect of these statutes upon the original rules of equity jurisprudence may be found in the case of *Wehrman v. Conklin* (155 U. S., 314), by Mr. Justice Brown, commencing at page 322:

This method of adjusting titles by bill in equity proved so convenient, that in many of the States statutes have been passed extending the jurisdiction of a court of equity to all cases where a party in possession, and sometimes out of possession, seeks to clear up his title and remove any cloud caused by an outstanding deed or lien which he claims to be invalid, and the existence of which is a threat against his peaceable occupation of the land, and an obstacle to its sale. The inability of a court of law to afford relief was a strong argument in favor of extending the jurisdiction of a court of equity to this class of cases.





The statute of Iowa, upon which this bill is based, is an example of this legislation, and provides (sec. 3273) that "an action to determine and quiet title to real property may be brought by any one having, or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession."

It will be observed that this statute enlarges the jurisdiction of courts of equity in the following particulars:

1. It does not require that plaintiff should have been annoyed or threatened by repeated actions of ejectment.

2. It dispenses with the necessity of his title having been previously established at law.

3. The bill may be filed by a party having an equitable as well as a legal title. (*Grissom v. Moore*, 106 Indiana, 296; *Stanley v. Holliday*, 30 N. E. Rep., 634; *Echols v. Hubbard*, 7 South. Rep., 817.)

4. In some States it is not even necessary that plaintiff should be in possession of the land at the time of filing the bill.

There remains a question as to whether this enlargement of the equitable remedy may be enforced in the Federal courts; and as to this the Supreme Court has declared in many cases that the enlargement of the right by the State statute does not preclude the Federal courts from entertaining cases thereunder so long as section 723, Revised Statutes, inhibiting suits in equity in any case where a plain, complete, and adequate remedy may be had at law is not contravened.

A review of those cases follows:

*Clark v. Smith* (13 Pet., 195) was the first case. This case involved the enforcement in the Federal

court of the statute of Kentucky declaring what shall constitute clouds on titles. Mr. Justice Catron declared the statute to have the effect of merely creating a new equity and that it does not enlarge the jurisdiction.

The next case was *Parker et al. v. Overman* (18 How., 137). This case did not involve the statute for determining adverse claims to real estate, but the principle involved is applicable here. The statute was that of the State of Arkansas, and directed that where lands are sold by a sheriff or other public officer the purchaser is authorized to institute proceedings in court calling upon all persons to come in and show cause why the same should not be confirmed. The court held that such a proceeding when instituted in a State court and removed into the Circuit Court of the United States constitutes a case over which a Circuit Court may take jurisdiction.

The next was the Broderick will case, found at page 503, in 21st Wall. This case involved the question as to whether the equity jurisdiction of a Federal court could be extended to set aside the will or a probate thereof, which proceeding was provided for by the statute of the State of California. The opinion, by Mr. Justice Bradley, contains this language, page 519:

The statute of 1862 has been referred to, which gives to the district courts of California power to set aside a will obtained by fraud or undue influence, or a forged will, and any probate obtained by fraud, concealment, or perjury. Whilst it is true that alterations





in the jurisdiction of the State courts can not affect the equitable jurisdiction of the circuit courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit courts, as well as by the courts of the State.

Other cases which uphold the right of the federal courts to enforce these state statutes are:

*Holland v. Challen*, 110 U. S., 15.

*Reynolds v. Crawfordsville Bank*, 112 U. S., 405.

*Gormley v. Clark*, 134 U. S., 338.

*Whitehead v. Shattuck*, 138 U. S., 146.

*Wehrman v. Conklin*, 155 U. S., 323.

*Bardon Land and River Improvement Co.*, 157 U. S., 327.

The result of the foregoing seems to be this: That these statutes enlarge the equitable right, but the original equity jurisdiction is not superseded; that in a suit under such statutes a case is made if the bill fairly recites the requisites contained therein; that such statutes may be enforced in the Federal courts subject to section 723, Revised Statutes, limiting the equity jurisdiction to cases where a plain, adequate, and complete remedy may not be had at law, and subject, also, to the constitutional right of trial by jury.

#### AS TO POSSESSION OF THE LAND.

If it be a sound contention that the United States, in its sovereign capacity, has the same right to rescind deeds to Indian lands taken in violation of its laws as it has with respect to other lands, little need be said as to the usual requirement of possession on the part of the complainant. This power exists independently

of any question of possession. The right of the Government to cancel patents to lands taken in violation of its laws is so well established that no repetition of the authorities hereinbefore mentioned need be made. It is well known that suits in equity are brought daily by the Government to cancel patents to lands which have been taken up and entered by and are in possession of individuals. Indeed it is difficult to see how the Government can take physical possession of land; in this respect the Government can be overreached at any time, hence the requisite of possession could not well apply.

In *United States v. Saunders et al.* (96 Fed., 268), hereinbefore cited, the United States appeared as sole party complainant to annul a deed given by an Indian of the Cœur d'Alene tribe to defendant Saunders, purporting to convey title to the grantor's homestead. It appeared that the act of January 18, 1881 (21 Stat., 315), relating to homesteads acquired by Indians, did not apply to the allotment in question. But the right of the United States to sue to annul the deed, had it been void by the statute, was distinctly upheld. It is true that the court observed that the bill was styled a "bill to quiet title to land," and the court questioned the right of the Government to sue to remove a cloud where the defendant was in possession, but it was said that the United States might sue to have the deed canceled. The distinction drawn by the learned judge in that case is not altogether clear, for, if the deed could be annulled, the decree would assuredly have the effect of removing the cloud.





It seems to be perfectly clear, therefore, that, suing by the same token by which it cancels patents to its lands generally, the question of possession can not be successfully raised.

Suing as guardian of the Indian, independent of its sovereign rights and duties, the question seems to be open to a somewhat greater discussion. Upon the question of possession there are three different phases, first, where the allottee is in possession; second, where the lands are vacant and unoccupied, and, third, where the land is in the possession of the defendant. Of these in their order:

As to those cases where the Indian is in possession no difficulty can arise either under the common law or the statute.

#### VACANT LAND.

In the second case—namely, vacant lands—the right seems to be equally clear. Obviously so, for the reason that if the defendant is not in possession there is no remedy by ejectment, as possession is the object of that remedy. Authorities to this effect are cited:

*Christy v. Springs* (11 Okla., 710), was an action to quiet title. The land was vacant and unoccupied. The court stated that the statute in force in Oklahoma requires possession on the part of the plaintiff, but at page 714 it is said:

However, independent of the statute, an action to quiet title may be maintained by the holder of the legal title where he is not in possession, if the premises are vacant and unoccupied, citing *Douglas v. Nuzen* (16 Kans., 515).

*Douglas v. Nuzen* (*supra*), was an action to quiet title under the statute, which is similar, word for word, to the Oklahoma statute. The opinion in that case was by Mr. Justice Brewer. It was held that, independently of the statute, an action to quiet title may be maintained by the holder of the legal title when he is not in possession if the premises are vacant and unoccupied.

*O'Brien v. Crietz* (10 Kans., 202) was an action to quiet title to vacant land. The opinion was by Mr. Justice Brewer, and at page 203 he says:

Upon the trial he (the plaintiff) testified that the lot was entirely vacant and unoccupied and then offered his deeds, which were objected to on the ground that he had not shown himself in actual possession. The objection was overruled, and this is alleged as error. We see none. It was decided in *Eaton v. Giles* (5 Kans., 24) that "an action to quiet title may be brought by the holder of the legal title when he is not in possession, if the real estate for which he holds the title is vacant." Where real estate is unoccupied and vacant the holder of the legal title has the constructive possession. It is true, when there is no actual possession, that the party holding title can not proceed under section 594 of the civil code. Yet he is not therefore without protection. He can have his title determined and protected.

*Utley v. Fee* (33 Kans., 683) was an action of ejectment. In that case a decree quieting the title to the land was attacked on the ground that complainant was not in actual possession of the land when the suit to quiet title was brought. At page 688 the court say:

While it is true that a person who is not in actual possession of real estate, by himself or





tenant, can not quiet the title under section 594 of the civil code, yet if he holds the legal title and the premises are vacant and unoccupied, he may maintain an action to quiet his title independent of said section. (*Douglas v. Nuzen*, 16 Kans., 515.)

*Hoffman v. Woods* (40 Kans., 382) was a case brought under the statute. No one was in the actual possession of the land, although it was proved at the trial that the plaintiff had prepared to sink posts on the land, and had taken parties there and offered it to them for sale. Beyond this there was no possession. The court held that a case had been made out under the statute, saying, at page 384:

Slight actual possession we think ought to be sufficient to enable a person to maintain this action as against a person who has no pretense of possession, as in this case.

*Davenport v. Stephens* (95 Wisconsin, 456), was a case to quiet title under the original equity jurisdiction. At page 459 the court says:

Some question was raised whether the plaintiff has shown such possession as should entitle her to maintain this action. It is entirely immaterial whether she was in the actual possession or not. No other person was in the actual possession.

In *Packard v. Beaver Valley Land and Mining Company* (96 Ky., 249) the bill alleged that the land was wild and uninclosed. The language of the court upon this point will be found commencing page 252 and is as follows:

This action, however, is not one to quiet title. That relief is asked it is true, but only

incidentally to the relief chiefly sought, which is to cancel the deed, alleged to be of record, of Rice to the defendant company. It can not be doubted that when, by fraud or questionable contrivance or irregularity, the title of the owner of land has been wrested from him and converted to the use of another he may bring his suit to cancel the conveyance, and it is no obstacle to the obtention of relief that the plaintiff is not in the actual possession of the land. That fact does not make less real the cloud on his title, and prevent the value of his property from being affected by the obnoxious deed. In such a case courts of equity will afford relief, as otherwise a wrong would be remediless. To this effect are the cases of *Herr, &c., v. Martin*, 90 Ky., 379; *National Bank Commerce, &c., v. Licking Valley Land and Mining Co.*, 15 Ky. L. R., 211; *Kant v. Hall*, *idem*, 511.

See also *Grand Rapids & I. R. Co. et al. v. Sparrow et al.*, 36 Fed., 210.

*So. Pac. R. Co. v. Goodrich et al.*, 57 Fed., 879.

*Holland v. Challen*, 110 U. S., 15.

*Taylor v. Clark*, 89 Fed., 7.

It will thus be seen that while possession was said to be a requisite at the common law, the rule seems to have been no broader than to require lack of possession by the defendant. It is obvious that where the defendant is not in possession there is no remedy at law, and it would be idle to contend that where neither party is in possession no remedy can be had in equity. The requisite of possession in these statutes is declaratory of the common law and there would appear





to be no good reason why a fair construction of the statute should not follow the rule of the common law in that regard.

#### EJECTMENT SOMETIMES INADEQUATE.

Notwithstanding the general rule that where the defendant is in possession the remedy at law is adequate, there seem to be many cases in which courts of chancery have removed a cloud from the title of the complainant in such cases on the ground that the remedy by ejectment is inadequate. Quoting from 17 Pl. & Pr., 311:

So a bill to remove a cloud will lie though the plaintiff is out of possession, where his legal remedy is inadequate, and it would seem that ejectment is an inadequate remedy in all cases where, although the plaintiff might recover possession, a void instrument or muniment of title would be left outstanding and uncanceled. In many cases the courts have incautiously stated the rule, without any qualification, that possession in the plaintiff is necessary to the maintenance of a suit to remove a cloud.

*Bunce et al. v. Gallagher et al.* (5 Blatchf., 481, 7 Am. Law Reg., n. s., 32) was in the Circuit Court for the Southern District of New York. The suit was in equity to annul a forged deed and to have it canceled and the record of it declared void; the defendants were in possession. The jurisdiction of the Federal court was objected to on the ground that there was an adequate remedy at law. Judge Shipman, in

considering the question whether the plaintiffs had an adequate remedy at law, uses this language:

But this difficulty is not presented by the bill. There is no question of title involved between the plaintiffs and the defendants, except that involved in the question whether the deed is forged or not. This forged deed has not impaired or complicated the title to this land. It has thrown a cloud over it, especially as it stands on the records of lands in the county where the property is situated; and this cloud obscures the true state of the title, and is well calculated to lead to misapprehension, embarrassment, and mistaken litigation. As the invalidity of the deed does not appear on its face, but can only be made apparent by extrinsic evidence, it is peculiarly the duty of a court of equity to sweep it away. The case of *Ward v. Dewey* (16 N. Y., 519), cited by the defendants on the point, concedes this doctrine. Pratt, J., at page 522, says: "But when such claim appears to be valid upon the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony to establish it, it presents a case for invoking the aid of a court of equity to remove it as a cloud upon the title. The case of fraud in procuring a deed to be executed which apparently conveys the title \* \* \* is a familiar illustration." There is here no controversy about a doubtful title between these parties, and the question of possession has no legal relation to the object now sought to be attained by the decree of this court.

Another Federal case was *Sayers et al. v. Burkhardt et al.* (85 Fed., 246). That case was in the Circuit Court of Appeals for the Fourth Circuit. The purpose of the bill was to set aside void judicial proceed-





ings and void deeds made in pursuance thereof and to free complainants' land from the levying of certain taxes. It does not clearly appear from the report of the case whether the defendant was actually in possession. It may be fairly assumed, however, that such was the case from the fact that the bill prayed that the complainants be restored to the enjoyment of their property. Objection to the bill was made on the ground that complainants did not allege that they were in possession of the land. Judge Goff, speaking for the court, held that the allegation of legal title of the complainants was sufficient. At page 247 he says:

In suits of this character such allegations are sufficient to give a court of equity jurisdiction, for under such circumstances where fraud is charged, or the cloud is caused by a tax deed, the remedy at law is not plain, adequate, and complete.

In *Kruczinski v. Neuendorf and wife* (99 Wis., 264) the complainants had been deprived of possession under a void decree and conveyances made in pursuance thereof. The defendants were in possession. It was held that the owners of the legal title, though not in possession, may maintain an action in equity to remove the cloud independent of the statute. The opinion of the court upon this point will be found at page 270, and is as follows:

Another ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action. This certainly

can not be maintained. (*Hawley v. Tesch*, 72 Wis., 299; S. C. 88 Wis., 213; *Lamberton v. Pereles*, 87 Wis., 449.) It is well settled that one having the legal title to land, though not in possession, may, independently of the statute, maintain a bill in equity to remove a cloud from his title. (*Pier v. Fond du Lac*, 38 Wis., 470; *Smith v. Sherry*, 54 Wis., 128; *Smith v. C., M. & St. P. R. Co.*, 83 Wis., 280; *Smith v. Zimmerman*, 85 Wis., 542; *Davenport v. Stephens*, 95 Wis., 459.)

Upon this general demurrer, the defendants were authorized to avail themselves of the objection that the plaintiffs had an adequate remedy at law. \* \* \* It does not appear, however, that the plaintiffs have an adequate remedy at law. Ejectment would merely secure the title and possession, leaving the outstanding deeds and mortgages as clouds upon the title.

In *Nixon v. Walter* (41 N. J. Eq., 103) it was held that while the statute required possession on the part of the complainant, the bill, in a proper case, might be sustained as a suit *quia timet* irrespective of the statute.

In *Beedle v. Mead* (81 Mo., 297) a deputy clerk of the court in which a judgment for costs was rendered, of his own motion and improperly, issued an execution thereon and agreed with the deputy recorder to buy in the land levied on under the execution. This was done and the defendant was in possession. It was held that the complainant, though out of possession, had redress in equity to cancel the sheriff's deed as a cloud on his title and need not resort to





ejectment. The opinion of the court on this point will be found, commencing page 303, as follows:

It is next asserted that if the sale attacked did not have the effect to pass the legal title, the plaintiff being out of possession, has no standing in a court of equity to have the deed vacated as a cloud on plaintiff's title. This proposition of law is generally correct. (*Clark v. Ins. Co.*, 52 Mo., 272; *Keane v. Kyne*, 66 Mo., 216.) This doctrine rests on the fact that the defect in the title assailed appears of record, through which the defendant must claim. In such case the action of ejectment will hit the blot. But where the judgment roll, for instance, does not, on its face, disclose the infirmity, and resort must be had to extrinsic evidence, especially parol evidence, to establish the vitiating fact, the right to invoke the aid of a court of equity is clear. (Cases above cited.)

*Hamilton et al. v. Batlin and wife* (8 Minn., 403) was a case in which the plaintiff was the owner in fee of certain land. One of the defendants forged a deed purporting to convey the same to himself. The bill was to cancel the forged deed and the record thereof. It was held that under the original equity jurisdiction the action could be maintained. The court's opinion is quoted from:

To show that a case of this character is of equitable cognizance we have but to refer to an elementary writer on the subject. Mr. Story in his *Commentaries on Equity*, vol. 2, sec. 701, says, in speaking of the cancellation of deeds: "The whole doctrine of courts of equity on this subject is referable to the general jurisdiction, which it exercises in favor of

a party, *quia timet*. It is not confined to cases where the instrument having been executed is void upon ground of law or equity. But it is applied even in cases of forged instruments, which may be decreed to be given up, without any prior trial at law on the point of forgery." Now that law and equity are administered by the same tribunals, no doubt can be entertained of the power to try all such questions in the present form of action.

In *King v. Carpenter* (37 Mich., 363) the defendant was in possession. Upon this point the courts say, page 366:

A preliminary question is raised upon the jurisdiction. The defendant claims that this is a bill of peace, filed under the statute to quiet title; and that it can only be filed by a party in actual possession. This it is said the complainant is not shown to have secured. And it is claimed a party out of possession must bring ejectment.

Undoubtedly where a party holding a legal title seeks to enforce it as against a person in possession claiming under an invalid title, or one which the party complaining claims to be such, the only proper remedy is ejectment, and that remedy is perfect. But where a party has an equitable cause of action against another, coming within any recognized rule of equity jurisdiction, such right can be enforced in equity, whether the complainant is in possession or not.

*Smith v. Zimmerman* (85 Wis., 542). In that case the defendant was in possession. The equity jurisdiction was sustained. The opinion of the court on this point, commencing page 544, follows:

The appellant contends that because the plaintiff was not in possession of the premises





when she brought her action she can not maintain it to remove a cloud upon the title. The action is not founded on the statute (S. & B. Ann. Stats., sec. 3186), but is an application to the inherent jurisdiction which courts of equity possess to prevent or remove clouds on title to land, and which they have exercised from a very early period. Evidence *aliunde* the record of the judgment becomes necessary to show that the premises in question, at the time of the recovery and docketing of the judgment by the defendant Zimmerman, were the homestead of the Sanborns, and that while it is an apparent lien it is in reality no lien or charge thereon. The Sanborns have a right thereafter to sell and convey their homestead, and the purchaser, the plaintiff, would take a valid title, free from the lien of the judgment. (S. & B. Ann. Stats., sec. 2983.) The plaintiff, as such purchaser, has a right to maintain this action to procure an adjudication declaring that the judgment in question is not a lien or charge on the premises she had purchased, and to prevent a sale thereof by any process depending for its validity solely upon the judgment, although she is not in actual possession; otherwise she might be without adequate remedy. The point raised by the appellant has been so frequently decided that further discussion is not necessary. (*Pier v. Fond du Lac*, 38 Wis., 479; *Goodell v. Blumer*, 41 Wis., 436, 442, and cases cited.)

In *Jackson v. Cooper et al.* (10 Tenn., 524), it was declared that a court of equity has inherent jurisdiction to declare deeds and other instruments void and to order them to be canceled and delivered up even though the defendant is in possession of the land, and that the plaintiff need not as a necessity resort to a court of law in ejectment. In that case there was no

ground of equity jurisdiction except that of cancellation; the deed was void because of its having been made upon a gaming consideration.

POSSESSION BY DEFENDANT IMMATERIAL WHERE THERE IS ANY GROUND OF EQUITY JURISDICTION.

The principle of equity jurisdiction that when the court obtains jurisdiction on any equitable ground it may proceed to adjust all matters between the parties relating to the subject-matter, whether legal or equitable, is so well established and recognized that a lengthy discussion of the point is hardly warranted. It is mentioned in this brief for the reason that it is possible that in many instances fraud has been an element in obtaining deeds and leases from Indian allottees. It is presumed that many allottees have executed instruments without knowing their real character as a result of misrepresentation by the vendees and lessees, and that many deeds and leases have passed upon consideration so grossly inadequate as to warrant interference by a court of equity. It is also possible that it will be advisable, if not actually necessary, to ask the court for injunctive relief against parties who are pursuing these practices in Oklahoma. The aid of the court may well be asked to restrain the defendant in each case from taking the further deeds and leases from the allottees in cases where the restrictions have not been removed. In such cases, and in all cases where some distinct and recognized branch of equity jurisdiction is invoked, the court will proceed to remove the cloud from the title regardless of the fact that the defendant may be





in possession, and that under ordinary circumstances the remedy at law would be adequate.

Quoting from A. & E. Ency., 1st ed., vol. 6, p. 692:

In general it may be said, however, that equity will not take jurisdiction where a plaintiff has a complete and adequate remedy at law. Accordingly, a court of equity will not take jurisdiction of cases arising out of torts, to prevent a mere trespass, in matters of crime, of questions of damages pure and simple, and many other similar cases. But where the jurisdiction has once been properly acquired by a court of equity, it will retain the case, and settle matters between the parties which do not afford original ground of jurisdiction. (See cases there cited.)

In A. & E. Ency., 2nd ed., vol. 11, p. 201, it is said:

A more substantial exception than the foregoing to the doctrine that equity will not take jurisdiction where the legal remedy is inadequate is found in the rule that if jurisdiction has once been assumed, equity will often retain it throughout the litigation, though the relief originally sought is denied and that finally granted is not equitable in its nature. (See cases there cited.)

In Pomeroy's Equity Jurisprudence, 3d ed., vol. 1, p. 329, the subject is clearly and exhaustively treated under the head "The doctrine that jurisdiction existing over some portion or incident extends to and embraces the whole subject-matter or controversy." After a lucid discussion of the principle, Mr. Pomeroy, beginning at page 352, says:

We have seen, in the foregoing paragraphs, that this conception of equity jurisdiction has

been steadily applied throughout the whole history of the court to a great variety of circumstances, litigations, and reliefs. By virtue of its operation, and in order to promote justice, the court, having obtained jurisdiction of a controversy for some purpose clearly equitable, has often extended its judicial cognizance over rights, interests, and causes of action which were purely legal in their nature, and has awarded remedies which could have been adequately bestowed by a court of law.

Indeed, it was this salutary principle which led to the "Reformed System of Procedure" which has since been adopted by the State of New York and many other States, and was practically adopted by England in the Supreme Court judicature acts; *idem* 354.

As supporting the proposition that a court of equity will take jurisdiction of all questions with respect to property before it as ancillary to its jurisdiction over the main case, attention is invited to the following decisions of the Federal courts:

- Gormley v. Clark*, 134 U. S., 338.
- Sunflower Oil Co. v. Wilson*, 142 U. S., 313.
- Ober v. Gallagher*, 93 U. S., 199.
- Hopkins v. Grimshaw*, 165 U. S., 342.
- Waite v. O'Neil*, 76 Fed., 408.
- North British & Mercantile Ins. Co. v. Lathrop*, 63 Fed., 508.
- Sill v. Solberg*, 6 Fed., 468.
- Hayden v. Snow*, 14 Fed., 70.
- Pacific R. R. v. Atlantic & P. R. Co.*, 20 Fed., 277.

The above authorities involve the general principle that where the court has jurisdiction on a dis-





tinct ground it will proceed to adjust all rights between the parties, whether legal or equitable.

Coming now to the question of removal of cloud from title, where the defendant is in possession, which, notwithstanding the authorities hereinbefore cited that removal of cloud is an equitable remedy, might be held to be a strictly legal remedy, it will be shown that even though the defendant be in possession, and under ordinary circumstances the case might be one for a court of law, a court of equity having jurisdiction on one point will retain the case and adjust all rights between the parties.

*Big Six Development Co. v. Mitchell* (1st L. R. A. (n. s.), 332), was an appeal from a decree of the Circuit Court of the United States for the Western District of Missouri to the Circuit Court of Appeals for the Eighth Circuit. The decree was in favor of the complainant to cancel a lease as a cloud on its title, and to enjoin the defendants from operating a mine covered by the lease. The defendant was in possession of the mine, and it was contended that the remedy was by ejectment at law. Judge Riner delivered the opinion of the court, and at page 339 he lays down the principle that although the legal title has not been settled in an action at law, the court, having jurisdiction to restrain the operation of the mine and injuries thereto, would proceed to remove the cloud by holding the lease to be void. Quoting from Judge Riner's opinion at the same page:

If the only relief sought by the bill in this case was to remove the cloud upon plaintiff's

title, it may well be doubted whether the bill could be sustained. (Citing cases.) But the bill goes further, and seeks to enjoin the defendant from committing waste and destroying the property as a mining property. In such a case jurisdiction in equity attaches, even where the plaintiff is not in possession. And, having obtained jurisdiction for that purpose, the court may, for the purpose of preventing a multiplicity of suits, retain it for further relief, and may remove a cloud upon the title, quiet the title, and determine the right of possession.

In this report of the case there is a valuable case note taken from the opinion of Judge Philips in the lower court. The learned judge treats of the elasticity of the equity jurisdiction, particularly with respect to the necessity of meeting new conditions. A short quotation follows:

In the constantly developing complications growing out of new conditions and situations in our complex commercial and business affairs the courts, in the very necessities of the occasions as they arise, must extend the protective, preservative hand of equity to meet the extraordinary demands of justice in the particular instance (p. 333).

Indeed it is but an application of the rule that it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

In *Shipman v. Furniss* (69 Ala., 555) the defendant was in possession. The deed had been procured by undue influence, and the relief sought was cancel-





lation of the deed and removal of cloud from the title. Demurrer was interposed to the bill on the ground that there was an adequate and complete remedy at law. Commencing page 562 the court say:

It is true that the jurisdiction of a court of equity can not be invoked, when the sole ground of equitable interference is the removal of a cloud from the title, unless the complainant is, at the time, in possession. (*Arnett v. Bailey*, 60 Ala., 435.) But the rule is different when the other distinct grounds of jurisdiction are averred. In such case a court of equity, having assumed jurisdiction for any one purpose, will retain it, that the whole litigation may be settled, and complete justice be done between the parties. (1 Story's Eq. Jur., secs. 228-9; *Lockett v. Hurt*, 57 Ala., 198; *Ray v. Womble*, 56 Ala., 32.)

In *Sale and wife v. McLean et al.* (29 Ark., 612), the jurisdiction was invoked to set aside a fraudulent decree as to lands of which the defendants were in possession. The opinion of the court upon the question of jurisdiction will be found, commencing page 618, and is as follows:

The objection is not that this court has not jurisdiction of a question of fraud, and to remove a cloud upon the title of complainants, but that being out of possession and the defendants in possession, the complainants have a clear remedy at law, in which the question of fraud may be inquired into, and complete redress afforded them, and in support of this position we are referred to the case of *Miller v. Neiman and wife* (27 Ark., 233), as well as to a carefully considered opinion of one of the judges of this court, in which, however, two

of the judges presiding declined to render any opinion upon that particular question. (*Apperson v. Ford and wife*, 23 Ark., 746.)

The opinion delivered by Judge Fairchild in that case, although not authoritative as the opinion of the court, seems to have been carefully considered with a reference to numerous authorities, which would seem to establish the position assumed by defendant's counsel, which is, that in order to maintain an action to remove a cloud upon the title of property, the party who brings his case into a court of chancery for that purpose should aver that at the time of bringing the suit she was in possession of the land. But it will also be seen that all of these cases are decided upon the ground that if the plaintiff is out of possession he has a clear remedy in a court of law by ejectment against the defendant, who is in possession, and in which the question of fraud can be inquired into, and full and complete justice done. But as the jurisdiction in cases of fraud is concurrent, where the rights of the party can not be asserted at law, or in cases where it can, when the remedy is not complete at law, the party may sue in equity, where complete and ample justice may be done, because it is the peculiar province of a court of equity to aid in administering the law in cases in which, by the rules of the common law, complete justice can not be done, but in no case to interfere with the jurisdiction of the courts of the common law in cases in which that court has power to afford adequate relief; and it is for this reason that when a party out of possession has a superior legal title he shall be held to resort to his action of ejectment to get possession; and it would seem that he should do this even when there is a cloud upon his title which he seeks to remove, which seems to be so well settled by adjudicated cases as well as by our own pre-





vious decisions (*Miller v. Neiman and wife*, 27 Ark., 233), that, under the state of case under which they were made, we must give them our approval.

But it is equally clear that, if for any other cause the court of law should be found incompetent to do full and complete justice, and particularly in case of concurrent jurisdiction, a court of equity may rightfully take jurisdiction, and render that full and complete justice which the courts of common law may, because of the more stringent rules which control its action, be found incompetent to do. Thus, in *Branch v. Mitchell*, it was held that although the complainant was not in possession, if no one else was in possession, there being no one in possession to sue in ejectment, the party seeking to get possession and to remove a cloud upon its title, might resort to a court of equity for redress; and it was also held in the same case that, as the complainants held the junior legal title with superior equities, he might for that reason also resort to equity for redress.

*Mott et al. v. Danville Seminary et al.* (129 Ill., 403) was a suit for partition of land, and in which the complainants set up the fact showing a disputed title, asking the court to determine the same, and to quiet them in their possession. The defendants to the suit were in possession at the time the same was brought. An objection to the jurisdiction was overruled on the ground that having jurisdiction for the purposes of partition the court would retain the case and administer the legal right.

Another Illinois case was *Haworth v. Taylor* (108 Ill., 275), in which the defendant was in possession.

The bill sought to redeem land from a sale on execution for irregularities and fraud therein, and also to set aside cloud caused by the sale. The syllabus upon this point is as follows:

A court of equity may well entertain jurisdiction of a bill by a party out of the possession of land against one in its possession to remove a cloud upon title, where it also seeks to redeem from a sale on execution for gross irregularities and fraudulent concealment of the sale.

The opinion of the court upon this point will be found at page 287:

Objection to the jurisdiction to entertain the bill, because Haworth was in possession at the time of the filing of the bill, and that under decisions of this court a bill to remove a cloud upon title will not lie where the defendant is in possession. We think it enough to say that the bill being, in one of its aspects, to redeem, the bill in such respect was well brought, irrespective of possession by the defendant.

POSSESSION BY DEFENDANT IMMATERIAL WHERE SEVERAL DEFENDANTS ARE JOINED IN ONE BILL TO AVOID MULTIPLICITY OF SUITS; SUCH A BILL IS NOT MULTIFARIOUS.

Where a single defendant is in possession it might be held that the only remedy is by ejectment at law. But where several defendants holding under different instruments of title from different grantors are joined in one suit, the equity jurisdiction can be invoked, the jurisdiction being founded upon the prevention of a multiplicity of suits. As this proposition may give rise to the related question whether





a bill in which are joined several defendants holding deeds to separate tracts of land, executed by different grantors, is open to the objection of multifariousness, the two points may well be considered together. If a remedy at law may be pursued in equity where a multiplicity of suits will be thereby avoided, it necessarily follows that the objection of multifariousness could not be maintained against such a bill. If, however, the remedy is not one ordinarily administered at law and equity has jurisdiction thereof, the objection of multifariousness might be properly raised.

A logical arrangement of the discussion would seem to be:

(a) What community of interest must exist between the several defendants against whom a single party proceeds? May the right be a legal as well as an equitable one?

(b) Citation of cases in which equity enforced a legal right against several defendants.

(c) Citation of cases of an original equitable nature in which several defendants were joined.

(d) A brief discussion as to what constitutes multifariousness.

Of these in their order:

(a) Mr. Pomeroy, in his admirable work on Equity Jurisprudence, vol. 1, p. 356, beginning paragraph 243, has given an exhaustive treatise on the doctrine that the equity jurisdiction exists in order to prevent a multiplicity of suits. At the very outset

he considers what "multiplicity of suits" is to be avoided.

On page 357 Mr. Pomeroy says:

In fact, the "multiplicity of suits" which is to be prevented CONSTITUTES THE VERY INADEQUACY OF LEGAL METHODS AND REMEDIES which calls the concurrent jurisdiction into being under such circumstances, and authorizes it to adjudicate upon purely legal rights, and confer purely legal reliefs. On the other hand, the prevention of a multiplicity of suits is the *occasion* for the exercise of the exclusive jurisdiction.

He divides the cases which he is to consider into four classes, the third and fourth of which are (quoting from page 360):

3. Where a number of persons have separate and individual claims and rights of action against the same party, A, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone. The case of several owners of distinct parcels of land upon which the same illegal assessment or tax has been laid is an example of this class.

4. Where the same party, A, has or claims to have some common right against a number of persons, the establishment of which would regularly require a separate action brought by him against each of these persons, or brought by each of them against him, and instead thereof he might procure the whole to be determined in one suit brought by himself against all the adverse claimants as co-defendants.





At page 365, in a preliminary discussion of the *rationale* of the doctrine, the author asks the question whether there must be some existing cause of action, equitable or legal, as a foundation for the jurisdiction. In doing so he says, at page 366:

The very object of preventing a multiplicity of suits assumes that there are relations between the parties out of which other litigations of *some* form might arise. But this prior existing cause of action, this existing right to some relief, of the plaintiff need not be equitable in its nature. INDEED, IN THE GREAT MAJORITY OF CASES IN WHICH THE JURISDICTION HAS BEEN EXERCISED THE PLAINTIFF'S EXISTING CAUSE OF ACTION AND REMEDIAL RIGHT WERE PURELY LEGAL; and it is because the only legal remedy which he could obtain was clearly inadequate to meet the demands of justice, partly from its own inherent imperfect nature and partly from its requiring a number of simultaneous or successive actions at law, that a court of equity is competent to assume or exercise its jurisdiction. It follows as a necessary consequence—and this point is one of great importance to an accurate conception of the whole doctrine—that the existing legal relief to which the plaintiff who invokes the aid of equity is already entitled NEED NOT BE OF THE SAME KIND AS THAT WHICH HE DEMANDS and obtains from a court of equity; on the contrary, it may be, and often is, an entirely different species of remedy.

At page 370, in discussing the question of privity of interest, the learned author says:

Suits have often been sustained by a single plaintiff against a numerous class of defendants, and by or on behalf of a numerous class of plaintiffs against a single defendant, avowedly

on the ground of "preventing a multiplicity of suits," where there was no relation existing between the individual members of the class and their common adversary to which the term "privity" was at all applicable. Of course there must be *some* common relation, some common interest, or some common question, or else the decree of a court of equity, and the relief given by it in the one judicial proceeding, COULD NOT BY ANY POSSIBILITY AVAIL TO PREVENT THE MULTIPLICITY OF SUITS which is the very object of its interference.

Commencing at page 388, the author considers together the third and fourth classes of cases as hereinbefore set forth, stating that it is plain that the same fundamental questions must arise in both of these classes. He then takes up for consideration the question as to what must be the character, the essential elements, and the external form of the common right, claim, or interest held by the number of persons against the single party, or by the single party against the number of persons; whether it is necessary that the common bond, element, or feature should inhere in the very rights, interests, or claims to such an extent that they create some positive and recognized existing legal relation or privity between the individual members of the group of persons, as well as between each of them and the single determined party to whom they all stand in an adversary position; or whether it is enough that the common bond or element consists solely in the fact that all the rights, interests, or claims subsisting between the body of persons and the single party have arisen from the same source, from the same event, or the same transaction, and in





the fact that they all involve and depend upon similar questions of fact and the same questions of law, so that while the same positive legal relation exists between the single determined party and each individual of the body of persons, no such legal relation exists between the individual members themselves of that body.

The two leading English cases on this point are generally known as "The Case of the Fisheries," *Mayor of York v. Pilkington* (1 Atk., 282), and "The Case of the Duties," *City of London v. Perkins* (3 Brown Parl. C., Tomlins's ed., 602). In the first case a large number of trespassers were named as defendants; the corporation had exercised and claimed an exclusive right of fishery over a certain portion of the river Ouse; the defendants were numerous owners of separate tracts of land adjacent to the river, and each claimed, in opposition to the city, an individual right of fishery. Lord Hardwicke sustained the bill, although the plaintiff had not established his exclusive title by any action at law, and although the claims of the various defendants were thus wholly distinct, and expressly based his decision upon the equitable jurisdiction to prevent a multiplicity of suits. The second case was brought to establish the right of the city of London to a duty payable by all merchants importing a certain article of merchandise. The bill was sustained, and the case cited and followed by Lord Hardwicke in deciding the Fisheries case.

After discussing *Whaley v. Dawson* (2 Schoales & L., 367), and deciding that the question of multiplicity of suits was not in issue, being merely that of multifariousness, the author states that the other English cases very clearly do not require any privity between the members of the numerous body, nor any common element or feature inhering in the very nature of their individual interests as between themselves (pp. 395-6).

The following is quoted from the footnote at page 401:

Even if each individual plaintiff would have had a right to equitable relief as well as to the legal relief of damages, the equitable jurisdiction to prevent a multiplicity of suits is never made to rest upon the particular kind or extent of relief which an individual party might otherwise have obtained in a separate suit. It always assumes that some relief, either legal or equitable, could have been thus obtained; and the only question, in cases of the third and fourth classes, is, whether there is sufficient common bond among the body of similarly situated persons on the one side of the controversy to authorize the court to interfere and give complete relief to them or against them all in one proceeding, and thus avoid a multiplicity of suits.

And commencing page 445 the author says:

The jurisdiction, based upon the prevention of a multiplicity of suits, has long been extended to other cases of the third and fourth classes, which are not technically "bills of peace," but "are analogous to" or "within the principle of" such bills. Under the great-





est diversity of circumstances, and the greatest variety of claims, arising from unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, ALTHOUGH THERE IS NO "COMMON TITLE," NOR "COMMUNITY OF RIGHT" OR OF "INTEREST IN THE SUBJECT-MATTER," AMONG THESE INDIVIDUALS, BUT WHERE THERE IS AND BECAUSE THERE IS MERELY A COMMUNITY OF INTEREST AMONG THEM IN THE QUESTIONS OF LAW AND FACT INVOLVED IN THE GENERAL CONTROVERSY, OR IN THE KIND AND FORM OF RELIEF DEMANDED AND OBTAINED BY OR AGAINST EACH INDIVIDUAL MEMBER OF THE NUMEROUS BODY. In a majority of the decided cases this community of interest in the questions at issue and in the kind of relief sought has originated from the fact that the separate claims of all the individuals composing the body arose by means of the same unauthorized, unlawful, or illegal act or proceeding. Even this external feature of unity, however, has not always existed, and is not deemed essential. Courts of the highest standing and ability have repeatedly interfered and exercised this jurisdiction, where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, SIMPLY BECAUSE THERE WAS A COMMUNITY OF INTEREST AMONG ALL THE CLAIMANTS IN THE QUESTION AT ISSUE AND IN THE REMEDY.

And commencing page 447 it is said:

The objection which has been urged against the propriety or even possibility of exercising the jurisdiction, either on behalf of or against a numerous body of separate claimants, where there is no "common title," or community "of right" or "of interest in the subject-matter" among them, is that a single decree of the court can not settle the rights of all; the legal position and claim of each being entirely distinct from that of all the others, a decision as to one or some could not in any manner bind and dispose of the rights and demands of the other persons, and thus the proceeding must necessarily fail to accomplish its only purpose, the prevention of further litigation. This objection has been repeated as though it were conclusive; but, like so much of the so-called "legal reasoning" traditional in the courts, it is a mere empty formula of words without any real meaning, because it has no foundation of fact. It is simply untrue. One arbitrary rule is contrived and then insisted upon as the reason for another equally arbitrary rule. The sole and sufficient answer to the objection is found in the actual facts. The jurisdiction has been exercised in a great variety of cases where the individual claimants were completely separate and distinct, and the only community of interest among them was in the question at issue and perhaps in the kind of relief, and the single decree has without any difficulty settled the entire controversy and determined the separate rights and obligations of each individual claimant. The same principle therefore embraces both the technical "bills of peace," in which there is confessedly a common right or title or community of interest in the subject-matter, and also those analogous cases over which the jurisdiction has been extended, in which there is no such common right or title or





community of interest in the subject-matter, but-only a community of interest in the question involved and in the kind of relief obtained.

And on page 455 the author enumerates the character of cases coming under the fourth class, among which are:

Suits by a single plaintiff to establish a common right against a numerous body, where there is only a community of interest in the questions at issue among these opposing claimants, but none in the subject-matter or title.

Suits by a single plaintiff against a numerous body of persons to establish his own right and defeat all their opposing claims, where the claims of these persons are legally separate, arose at different times and from separate sources, and are common only with respect to their interest in the question involved and in the kind of relief to be obtained by or against each.

(b) The citation of authorities will be confined to those in the Federal courts. If reference to English and State cases is desired, the work of Mr. Pomeroy will afford ample citations to such cases.

*DeForest et al. v. Thompson, Commissioner, et al.* (40 Fed., 375), was a suit to set aside certain sales of land made by the sheriff of Boone County, W. Va., for the nonpayment of taxes thereon. It was contended that the remedy was by ejectment, the defendants being in possession. The opinion was by Judge Jackson, Justice Harlan concurring, and will be found commencing page 378:

Each defendant's title depends upon the same questions, and those questions all have

relation to the proceedings in the Boone circuit court, and to the attempt to forfeit the lands for nonpayment of taxes. It is a case of one person having a right against a number of persons, which may be determined as to all the parties interested by one suit. If the plaintiffs brought ejectment against one of the defendants, and succeeded, the judgment would not conclude the other defendants, although the question in each case would be precisely the same. But if the plaintiffs can, by one comprehensive suit, have their rights declared and secured as to all the lands, the possession of which is withheld by the defendants, each claiming a particular parcel, but all basing their claims upon the same proceedings instituted by the officers of the State, may they not invoke the jurisdiction of a court of equity upon the familiar ground that by suing in equity and bringing all the defendants before the court in one action they can avoid a multiplicity of suits? I think they can. (1 Pom. Eq. Jur. Par., 245-269, inclusive.)

*Preteca et al. v. Maxwell Land Grant Co.* (50 Fed., 674) was a bill in equity by the Maxwell Company against Preteca and others to quiet title. There was a decree for the complainant at the circuit, and an appeal to the Circuit Court of Appeals. The bill averred that the Maxwell Company was the owner of certain lands; that defendants were unlawfully in possession of part of the land, and asked to have complainant's title quieted. The case was heard before Caldwell, Sanborn, and Shiras. Judge Caldwell, rendering the opinion of the court upon the contention that the remedy at law was adequate, the court at page 676 say:





The only error relied upon in argument is that the complainant's remedy was at law, "and a court of chancery has no jurisdiction of the cause." From the averments of the bill it is obvious the complainant resorted to equity to avoid a multiplicity of suits and irreparable damage resulting from continued acts of waste and trespass to land. These are recognized heads of equity jurisdiction. A court of equity may take cognizance of a controversy to prevent a multiplicity of suits, although the exercise of such jurisdiction may call for the adjudication upon purely legal rights and confer purely legal relief; and so a court has jurisdiction to restrain waste and trespass to land where the facts are of such a nature that the law can not afford adequate relief. (1 Pom. Eq. Jur., secs. 243, 245, 252, 271-274, and cases there cited.)

*New York Life Insurance Co. v. Beard et al.* (Circuit Court for the District of Kansas, 80 Fed., 66). This was an action by a judgment creditor of a corporation against several stockholders under a statute of Kansas authorizing such creditors to proceed by action to charge the stockholders for the amount of his judgment. It was contended that there was a remedy at law, but District Judge Foster lays down the principle that the same point of law was to be determined as against all of the stockholders, and that while equity would not interfere if there was a plain and adequate remedy at law, the prevention of a multiplicity of suits at law would justify a resort to equity, and sustained the bill.

*Sang Lung v. Jackson, Collector* (85 Fed., 502, Circuit Court of Northern District of California). A

number of persons having distinct interests in a quantity of tea about to be destroyed by the collector of customs joined in an action against the collector in equity. At page 504 Judge DeHaven, in passing upon a demurrer to the bill challenging the equity jurisdiction on the ground of an adequate remedy at law and misjoinder, says:

It is true that each of the complainants has a separate and distinct interest in the tea which the defendant threatens to destroy, but they all have a community of interest in the subject-matter of the controversy; that is, a common interest in the question whether the defendant is authorized by law to destroy such tea. The alleged rights of each and all of the complainants depend upon the same facts, and must therefore, necessarily, be determined by the same principle of law. In such a case a court of equity will take jurisdiction in order to prevent a multiplicity of actions. (1 Pom. Eq. Jur., sec. 269; *Osborne v. Railroad Co.*, 43 Fed., 824; *DeForest v. Thompson*, 40 Fed., 375.)

In *Pennefeather et al. v. Baltimore Steam Packet Co.* (58 Fed., 481) a suit was brought by some owners of goods on behalf of all who might join with them to recover their interest in insurance collected by the defendant carrier. There was a demurrer to the bill which, among other things, set up the ground that there was an adequate remedy at law. Quoting from the opinion of the court, page 483:

As to the objection urged that this is not a case of equity cognizance, it is true that each complainant, if he has a good cause of action, might maintain an action at law to recover



suits to be avoided or prevented are of a legal or an equitable character. The object is the same in either case, and the reason for the proceeding is the same.

There is a common question in the case between the receiver and the defendants, namely, the question whether the latter were released from their stock subscription by the fact that, whereas the resolution for increasing the stock in the sum of \$300,000 was that under which their subscription took place, yet subsequently, by proceedings to which they did not consent, the proposed increase was reduced to \$150,000. The protest interposed by Bailey in behalf of himself and the other stockholders to the certification by the comptroller of the modified increase of the capital stock of the bank assumes that they stood on the common ground already stated. And these circumstances, namely, the great number of the parties on one side or the other, the identity of the question of law, and the similarity of the facts in the several controversies between the respective parties, are the basis on which the jurisdiction rests. The object is to minimize litigation, not only in the interest of the public, but also for the convenience and advantage of the parties. If the receiver was compelled to bring separate suits, it would entail a vast expense upon the fund in trying over and over again the identical questions of law and fact with each stockholder, and with no substantial advantage to him, but injury, rather, in the increased cost in the immediate suit, and the larger burden upon the fund, created by the many suits against the others.

Nor is it necessary, as counsel seem to suppose, that there should be any privity of interest between the stockholders, other than that in the question involved and the kind of relief sought, the right of their claims being common





to them all, in order to bring the case within the jurisdiction. In several of the early cases of this class which established and confirmed this ground of equity no such requirement was made, and no such fact existed. (*Mayor of York v. Pilkington*, 1 Atk., 282; *Lord Tenham v. Herbert*, 2 Atk., 483; *City of London v. Perkins*, 3 Brown, Parl. Cas., 602; *New River Co. v. Graves*, 2 Vern, 431.) In the origin of its establishment the jurisdiction was most frequently illustrated upon "bills of peace," so called, but, as time has gone on, experience has proved the utility of this doctrine of equity, and its application has been broadened and extended to a great variety of subjects and conditions to which it is found profitably applicable. A near-by case is that of *Louisville, N. A. & C. Ry. Co. v. Ohio Val. Imp. & C. Co.* (C. C., 57 Fed., 42), where it was held that a railroad company whose guaranty had been indorsed upon the bonds of another company, without authority, as it was claimed, might maintain a bill in equity against the holders thereof to cancel the guaranty on the ground of preventing a multiplicity of suits, although it might have a good defense at law to each of the bonds. Other authorities there cited, and which are pertinent also to the present inquiry, are *Railway Co. v. Schuyler*, 17 N. Y., 592; *Supervisors v. Deyoe*, 77 N. Y., 219; *Black v. Shreeve*, 7 N. J., Eq., 440; *Waterworks v. Yeomans*, 2 Ch. App., 11; and Pom. Eq. Jur., secs. 222, 911, et seq. The cases in which a like principle is recognized and applied are too numerous for citation. Many of them are collected in Pomeroy's Equity Jurisprudence in the notes to the sections referred to. It is true there are occasional cases where it seems to have been supposed that there must be some community of interest—some tie between the individuals who make up the great number; but the great

weight of authority is to the contrary, and there is a multitude of cases which either in terms deny the necessity of such a fact or ignore it by granting relief where the fact did not exist. And, indeed, it is difficult to find any reason why it should be thought necessary. It has no relevancy to the principle or purpose of the doctrine itself, which stands not merely as a make-weight when other equities are present, but as an independent and substantive ground of jurisdiction.

*Boyd et al. v. Schneider et al.* (131 Fed., 223) was a case in the Circuit Court of Appeals for the Seventh Circuit. Several depositors of a bank brought suit against the directors of the bank arising out of their failure to take steps to protect the bank assets from being improperly loaned. Judge Grosscup, speaking for the court, at page 228, says:

The case, as already stated, appears to us to be one clearly of equitable cognizance. The rule relating to equitable jurisdiction applicable to this case is laid down by Pomeroy as follows: Where a number of persons have separate or individual claims and rights of action against the same party, all arising from some common cause, governed by the same rule, and involving similar facts, so that the whole matter might be settled in a single suit brought by all the persons uniting as coplaintiffs, or one of the persons suing on behalf of himself and others; or, where one party has a common right against a number of persons, the establishment of which would regularly require a separate action brought by him against each of these persons, instead whereof he might procure the whole to be determined in one suit, a bill in equity will lie on the ground that it prevents a multiplicity of suits. (Pomeroy, *Equity Juris.* (2d ed.), vol. 1, sec. 245.)





In *Hale v. Allinson* (188 U. S., 56) the equity jurisdiction was denied, but the case is so highly instructive by way of distinction of the foregoing cases that attention is invited to it. Under the facts as set forth in the bill it appeared that the interests of the defendants were so entirely separate and distinct, and the cases subject to such a variety of differences that the jurisdiction did not lie. The court, through Mr. Justice Peckham, deals at considerable length with the equity jurisdiction for preventing a multiplicity of suits, calling attention to the great variety of cases in which the court has either taken or refused jurisdiction, and holds that there is no uniform rule by which the question may be determined. At page 78 the learned justice says:

We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases in behalf of a single complainant against a number of defendants, although there is no common title nor community of right or interest in the subject-matter among such defendants, but where there is a community of interest among them in the questions of law and fact involved in the general controversy. (Citing among others, *Bailey v. Tillinghast*, *supra*.)

It must be borne in mind that in this case the equity jurisdiction upon other grounds was denied, and that the opinion of the court with respect to the question of multiplicity of suits was independent of any other question of equity jurisdiction. The court affirms the opinion of the district judge in the same case, and quotes it as being a correct statement of the

law. Repeating part of that quotation found on page 79:

Manifestly, as it seems to me, the defendants have no common interest in these questions, or in the relief sought by the receiver against each defendant. The receiver's cause of action against each defendant is, no doubt, similar to his cause of action against every other, but this is only part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up his defence, and defences may vary so widely that no two controversies may be exactly or even nearly alike.

In the case at bar, several vendees are made defendants to a bill by the United States. The complainant contends that a statute declares void all deeds taken to lands allotted in severalty to Indians of a particular tribe. While this statute was in force the several defendants took these deeds from Indians belonging to this particular tribe. Manifestly they must all stand or fall together. The questions of fact are the same, namely, whether the vendor was an Indian of that particular tribe, and whether the deed was given during the time the restrictive statute was in effect. The point of law, if any, is the same, namely, whether the provisions of the statute are valid. The simple, clear-cut nature of the case is easily distinguishable from *Hale v. Allinson*, and is clearly within the rules laid down therein in support of the equity jurisdiction.

(c) In *So. Pac. R. R. Co. v. United States* (200 U. S., 346) the bill was brought by the Government, under an act of Congress to recover from a railroad com-





pany the value of lands erroneously patented and sold by it to numerous persons, some of whom were made defendants as representatives of a class. All of the rights of the entire class were determined in the one suit, their right and title depending upon the same point of law.

*Bitterman v. L. & N. R. R.* (207 U. S., 205) was a suit in which the Supreme Court of the United States clearly defined the right to join in one suit a number of defendants where the same relief is sought against each, and the same principles of law are to be applied although there is no privity between them. The syllabus of the case is as follows:

An action against a number of defendants is not open to the objections of multifariousness and of misjoinder of parties if the defendants' acts are of a like character, the operation and effect whereof upon the rights of complainants are identical and in which the same relief is sought against all defendants, and the defenses to be interposed are necessarily common to all defendants and involve the same legal questions.

The bill was filed by the complainant to enjoin a number of ticket brokers from dealing in nontransferable round-trip tickets issued at reduced rates for passage over the railway lines of the complainant. It was urged that there was an improper joiner of defendants and of independent causes of action. Quoting from the opinion of Mr. Justice White, at page 226:

The proposition that the bill was multifarious because of the misjoinder of parties and

causes of action was not assigned as error in the Circuit Court of Appeals, and, therefore, might well be held not to be open. But passing that view, we hold the objection to be untenable. The acts complained of as to each defendant were of a like character, their operation and effect upon the rights of the complainant were identical, the relief sought against each defendant was the same, and the defenses which might be interposed were common to each defendant and involved like legal questions. Under these conditions the case is brought within the principle laid down in *Hale v. Allinson* (188 U. S., 56, 77).

In *United States v. Curtner* (26 Fed., 296) the United States proceeded against a number of defendants to set aside patents to lands which were allotted to the State of California, and by the State patented to private parties. In answer to the contention that the bill was multifarious the court at page 298 says:

It is claimed that the action is multifarious, in that each of the parties defendant has a separate patent from the State. These lands were listed to the State under one act. It is possible that they were listed at different times, but it was all done under one act, and the rights of the railroad company, the moving cause of this suit, are derived from the United States under one act. There are therefore two points of title common to all the parties. The same questions arise as to all of these defendants, and the case of each will be decided on the same issues and the same testimony. There is no difficulty, then, in litigating all the questions, and the rights of all the parties, in the same suit. In this matter of multifariousness, in equity practice, there is no definite, absolute, unbending rule. It rests





very much in the discretion of the court. The litigation in this suit will prevent a multiplicity of suits. A suit brought against each defendant, respectively, would be oppressive to the Government and to all parties, and be much more expensive to both. I think the bill is unobjectionable in that particular.

In *Osborne et al. v. Wisconsin Cent. R. Co.* (43 Fed., 824) the plaintiffs claimed to be the owners of certain distinct tracts of land acquired by them under the homestead and preemption laws of the United States. The railroad company claimed the land and threatened to bring actions of ejectment against each of the plaintiffs. The plaintiffs joined in this suit to quiet title. Mr. Justice Harlan, sitting at the circuit, delivered the opinion of the court, which will be found commencing page 826, and is as follows:

The demurrer to the bill presents the question whether the case is one justifying the intervention of a court of equity, or whether the question of title to each tract—all the tracts being within a larger boundary, and the whole being claimed by the railroad company as a part of its place lands under the act of 1864—must be determined in separate actions of ejectment against the respective plaintiffs.

We are of the opinion that the objection to the bill is not well taken. Were the lands held by the plaintiffs granted by the act of Congress of 1864 for the benefit of the road named in its third section, or were they, when that act was passed, by reason of their having been previously withdrawn from sale or location “reserved to the United States,” and therefore, within the meaning of the sixth section, excluded from the grant made by the third section? If, when the act of 1864

was passed, they were "reserved to the United States," the law is for each of the plaintiffs. While the plaintiffs have separate and distinct interests because of their respective claims of ownership of separate and distinct tracts of land, they have a community of interest in the subject-matter of the controversy relating to these lands, and a common source of title, namely, the action of the Land Department opening these lands for entry under the homestead and preemption laws of the United States. They have thus a community of interest in the questions of law and fact upon which the issue between the railroad company and each plaintiff depends. The company's claim is good or bad against all the plaintiffs, as it may be good or bad against any one of them; and yet a judgment in favor of one, in an action of ejectment brought by the company, would not avail the others in separate actions of ejectment against them. The case is peculiarly one in which the jurisdiction of a court of equity may be invoked in order to avoid a multiplicity of suits. It belongs to the class "where a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as coplaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone." (1 Pom. Eq. Jur., secs. 245, 255, 257, 268, 273, and authorities cited in notes to these sections. *Crews v. Burcham*, 1 Black, 352, 357.) In such cases the plaintiffs are united by a common tie, created by identity of interest in the decision of the same questions of law and of fact, and have a common





adversary. The fact that the several tracts of land here in dispute were entered at different dates, and by different persons, is of no consequence, as the validity of each entry, as against the railroad company, depends upon precisely the same questions of law and fact.

*California Fig-Syrup Co. v. Worden & Co. et al.* (86 Fed., 212) was a suit brought against several defendants to enjoin them from making, selling, or offering for sale any preparation under the name of "Syrup of Figs." The objection of multifariousness was urged to the bill. The opinion of the court on this point will be found at page 219:

With respect to the technical objection that the bill is multifarious, it is perhaps sufficient to say that the bill alleges that the defendants, knowing the premises, have fraudulently conspired together to perpetrate the frauds set forth in the bill. Moreover, whether an objection of this kind should be entertained depends largely upon the discretion of the court. As a general rule, it may be said that, whenever the several matters set up in the bill require entirely distinct and different kinds of relief, the bill is multifarious; but, if the relief sought is the same as against all the defendants, it does not appear that the objection should be considered sufficient to sustain the demurrer.

The case, however, that seems to be decisive of the case at bar is that of *United States v. Flournoy Live-Stock & Real-Estate Co. et al.* (69 Fed., 886). In that case the United States brought its bill against 231 defendants, alleging that they had illegally secured leases from Indian allottees and had taken possession

of the land. It was alleged that the statute under which the Indians had taken their allotments declared that all leases of the same should be void. After alleging the illegal taking of the leases and the illegal possession of the lands, the bill asked for an injunction restraining the defendant from interfering with the Indian agent in his efforts to clear the reservation of the intruders and from in any manner interesting or inducing the Indians to lease or otherwise contract about their lands, and commanding them to vacate all lands held by them. A demurrer to the bill set up that there was an adequate remedy at law, and that the bill was multifarious in joining a number of defendants upon separate causes of action. Quoting from the opinion of Judge Shiras at page 890:

The second ground of demurrer is that the bill is multifarious, because it is exhibited against a large number of defendants who held under different leases, executed by different lessors, and that there is no common interest justifying the bringing the one suit, instead of separate proceedings against each defendant.

In *Walker v. Powers* (104 U. S., 245) it is said: "By multifariousness is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters, of a distinct and independent nature, against several defendants, in the same bill." (Story, Eq. Pl., sec. 271.)

In the case at bar the complainant's right of action is based upon the trust relation existing between the United States and the Indians in





regard to the lands in question, and there is therefore a common interest and a common question, as against all the defendants; and therefore the bill will not be held to be multifarious, being within the rule stated in Story, Eq. Pl., sec. 285, to wit:

Another exception to the general doctrine respecting multifariousness and misjoinder, which has already been alluded to, is, when the parties (either plaintiffs or defendants) have one common interest touching the matter of the bill, although they claim under distinct titles and have independent interests (in which event the objection of multifariousness will not be sustained).

(d) In *Gaines v. Chew et al.* (2 How., 619) the court at page 642 say:

It is well remarked by Lord Cottenham in *Campbell v. Mackay* (7 Sim., 564, and in 1 Myl. & C., 603,) "to lay down any rule, applicable universally, or to say, what constitutes multifariousness, as an abstract proposition, is upon the authorities, utterly impossible." Every case must be governed by its own circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided, by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts.

In a course of reasoning in the above-cited case, Lord Cottenham observes: "If, for instance, a father executed three deeds, all vesting property in the same trustees, and upon similar trusts, for the benefit of his children,

although the instruments and the parties beneficially interested under all of them were the same, it would be necessary to have as many suits as there were instruments. That is a proposition (he says) to which I do not assent. It would, indeed, be extremely mischievous, if such a rule were established in point of law. No possible advantage could be gained by it; and it would lead to a multiplication of suits, in cases where it could answer no purpose to have the subject-matter of contest split up into a variety of separate bills." The same doctrine is found in Story's Equity Pleading, sec. 534; *Attorney-General v. Craddock*, 3 Myl. & C., 85; 7 Sim., 241, 254.

In *Walker v. Powers* (104 U. S., 245) multifariousness is thus defined by Mr. Justice Miller at page 251:

By multifariousness "is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill." (Story Eq. Pl. sec. 271.) In Daniell's Chancery Practice, 335, it is said in explanation of this that "it may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and, nevertheless, those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records."

*Singer Mfg. Co. v. Springfield Foundry Co. et al.* (34 Fed., 393), the court, citing *Oliver v. Pratt* (3 How., 333), say:

The defense of multifariousness is also relied upon. The defendant Duckworth has an-





swered, proofs have been taken, and a hearing had upon the merits of the bill. I do not see in what respect the defendant suffers any injury by having these causes of action heard together. All the patents sued upon relate to one machine, and the defendant is not prejudiced by this joinder. Whether a bill is multifarious or not must depend upon its own circumstances, and must necessarily be left to the discretion of the court.

In *Powers v. Keercher* (9 Iowa, 422) the court says:

The rule is one of defense; although the matters are distinct, yet, if justice can not be administered between the parties without multiplicity of suits, the objection of multifariousness will not prevail.

And Mr. Justice Story observes:

The conclusion, to which a close survey of all the authorities will conduct us, seems to be, that there is no positive, inflexible rule, as to what \* \* \*, constitutes multifariousness which is fatal to the suit on demurrer. (Par. 539.)

These courts have always exercised a sound discretion in determining whether the subject-matters of the suit are properly joined and whether the parties, plaintiffs or defendants are also properly joined or not. (Story Eq. Pl., par. 539, citing *Oliver v. Pratt*, *supra*.)

Quoting from Jensen's Chancery Practice, page 26:

As to what constitutes multifariousness no general rule can be laid down. Every case must be governed by its own circumstances, and the court must exercise a sound discretion; still it may be said generally that there must be a common interest, a common ground of relief, and a common ground of invalidity. (Citing cases.)

Beach on Modern Equity Practice, vol. 1, p. 142, par. 115, speaking of multifariousness, says:

It is almost universally declared that every case must be governed by its own circumstances, and that the question is left to the discretion of the court.

#### TENDER OF PURCHASE MONEY UNNECESSARY.

It may be contended that in the case of void deeds the amount of the purchase money must be tendered. This claim, if made, will doubtless be based upon the equitable principle which has been applied in some cases of rescission and cancellation, quieting title, removal of cloud, etc., that one seeking equity must do equity; and it is conceded that in many cases involving these heads of equity jurisdiction the principle has been applied. There is a great variety of cases, however, with an equally great variety of decisions, and no general rule is laid down. The controlling principle is the equitable maxim just quoted; and, of course, no one may invoke the maxim unless he be possessed of an equity.

There are several reasons why a tender by the United States in these cases is unnecessary. They are as follows:

(1) *The suit is not one between vendor and vendee.*

This is not a case, at least in two of its aspects, where two persons have entered into a transaction and one of them invokes the equity jurisdiction to rescind the transaction or to cancel the executed instrument. It is not a case between the Indians and their vendees and lessees. It is a suit between





the United States and the lessees and vendees in which the United States appears in its sovereign capacity as party complainant for the purpose of enforcing the conditions attached to its grants and to clear the allottee's title in order to carry out its guarantees arising from solemn treaty obligations. It also sues to rescind acts forbidden by the Indian treaties and by the laws of Congress relating to a subject which is entirely within the control of the Federal Government, and it has the right, independent of the relations between vendor and vendee and lessor and lessee, to see that its laws are respected and that the effect of acts done in open violation and defiance of such laws is neutralized.

This power is not unique nor unusual. It is exercised by the Government in all cases where it has plenary authority and control over a particular subject-matter. It was exercised and expressly upheld in the famous case of *In re Debs* (158 U. S., 564). That case upheld the right of the Government, independent of statute, to appear as party complainant in a bill to remove and enjoin obstructions to highways used in interstate commerce and in the transportation of the mail.

It is highly significant that in the Flournoy cases, in which the Government appeared as sole party complainant to restrain lessees and sublessees from entering upon Indian lands leased in violation of its treaties and laws and to declare such leases void, not the barest suggestion was made, either in the pleadings, the contentions of counsel, or in the lengthy opinion

of the court, that the United States should pay to the lessees the rental money for the unexpired term. Indeed, as will be hereinafter shown by quotations from those cases, the court refused even to recognize any equity in the fact that the lessees had growing crops upon the leased lands at the time they were enjoined and the leases declared void.

And the same is true of *United States v. Saunders* (96 Fed., 268), in which the United States brought its bill in equity to quiet title to land which an Indian had attempted to convey and as to which there was a restriction on alienation. It will be remembered that in that case the court held, and rightfully so, that the restriction on alienation did not apply in that particular case, but the court, possibly unnecessarily, went into the other questions in the case. It questioned the right of the United States to ask for the special relief prayed in the bill, but it did say that under the general prayer for relief the Government would be entitled to have the deed surrendered for cancellation. And throughout this whole searching analysis of the case there is not the slightest suggestion from the court as to any obligation on the part of the United States to tender the purchase money.

If, irrespective of the relation of guardian, the United States rightfully appears as party complainant in these suits, there is no theory upon which the defendants can demand of it a return of the purchase money. The suit does not rest upon any privity of contract. If the decree sought by the United States





shall cause a failure of consideration the vendees and lessees might possibly have their action in assumpsit against their vendors and lessors.

(2) *A sovereign government is not required to tender purchase price of lands received in a manner not permitted by its statutes.*

But there is another principle upon which the United States may sue in these cases without making tender. We have seen that the disposal of lands to the Indian tribes and the members thereof rests upon the same provision of the Constitution under which Congress disposes generally of the public domain. It is the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." (Constit., Art. IV, sec. 3, cl. 2.) We have further seen that "all lands in the Territories, not appropriated before they were acquired, are the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles, as the Government may deem advantageous." (*Irvine v. Marshall*, 20 How., 558.) And that "Congress has the sole power to declare the dignity and effect of titles emanating from the United States." (*Bagnell v. Broderick*, 13 Pet., 436.)

We have further seen that there is no difference in principle between the wrongful acquisition of land, or acts which militate against the purity of the title thereto, under the general land laws and the wrongful acquisition of or acts affecting the title to lands which are placed in the hands of In-

dian tribes or the members thereof upon the express condition that they shall go no further; and that if the United States may have relief in the one instance there is no reason why it may not have the same relief in the other.

If the United States can act in the one case without making tender it would seem logically to follow that it may in the other, if, indeed, there is any theory at all upon which the question could be raised with respect to these Indian lands. Waiving the striking difference between the two cases, the United States actually receiving the money in one instance and neither receiving nor having any connection with the purchase price in the other, it has been definitely settled that in suing to undo the acts of violators of its land laws the Government is not required to tender the money paid by the defendants. It has brought hundreds of suits to recover lands and to cancel patents thereto obtained in a manner not permitted by its laws, and it has never been required to make tender in order to maintain the suit.

The Supreme Court of the United States has specifically held that no such tender is necessary. In the case of the *United States v. Trinidad Coal & Coking Co.* (137 U. S., 160) the bill averred that that coal company had entered into a scheme whereby its officers, stockholders, and employees were to make entries of coal lands at \$10 and \$20 per acre, in their own names and ostensibly for their use and benefit, while in truth and fact the





lands were to be taken up for the benefit of the coal company, and that it had paid the full purchase price in each entry. The bill further averred that such a scheme was not warranted by the statute under which the lands were taken up, and sued to cancel the patents, and the bill was sustained. It was contended by the defendant corporation that the Government, asking equity, must do equity, and that therefore the bill was defective in not containing an offer to refund the moneys which were paid when the lands were entered. Quoting from the opinion of Mr. Justice Harlan, beginning page 170:

It is contended by the defendant that the United States is subject, as a suitor, to the same rules that control courts of equity when determining, as between private persons, whether particular relief should be granted; that the Government, asking equity, must do equity; and, consequently, that the bill is defective in not containing a distinct offer to refund the moneys which, it is alleged, were furnished by the defendant to the several persons to whom patents were issued. The rule referred to should not be enforced in a case like the present one. In the matter of disposing of the vacant coal lands of the United States the Government should not be regarded as occupying the attitude of a mere seller of real estate for its market value. It is not to be presumed that the small price per acre required from those desiring to obtain a title to such lands had any influence in determining the policy to be adopted in opening them to entry. They were held in trust for all the people; and in making regulations for disposing of them Congress took no thought of their pecuniary value, but, in the discharge of a high

public duty and in the interest of the whole country, sought to develop the material resources of the United States by opening its vacant coal lands to entry by individuals and by associations of persons at prices below their actual value. THE CONTROLLING OBJECT OF THIS AND SIMILAR SUITS IS TO ENFORCE A PUBLIC STATUTE AGAINST THOSE WHO HAVE VIOLATED ITS PROVISIONS. IT IS NOT DISPUTED THAT THE ATTORNEY-GENERAL MAY, IN VIRTUE OF THE AUTHORITY VESTED IN HIM, INSTITUTE THIS SUIT. ACCORDING TO THE ALLEGATIONS OF THE BILL, WHICH ARE ADMITTED TO BE TRUE, THE DEFENDANT IS A WRONGDOER AGAINST WHOM THE GOVERNMENT SEEKS TO VINDICATE ITS POLICY IN REFERENCE TO THE DEVELOPMENT OF ITS VACANT COAL LANDS. Congress, when establishing that policy, was not bound to assume that individuals or associations of individuals would attempt to defeat it by means of fraudulent schemes or otherwise. If the defendant is entitled, upon a cancellation of the patents fraudulently and illegally obtained from the United States, in the name of others, for its benefit, to a return of the moneys furnished to its agents in order to procure such patents, we must assume that Congress will make an appropriation for that purpose, when it becomes necessary to do so. THE PROPOSITION THAT THE DEFENDANT, HAVING VIOLATED A PUBLIC STATUTE IN OBTAINING PUBLIC LANDS THAT WERE DEDICATED TO OTHER PURPOSES, CAN NOT BE REQUIRED TO SURRENDER THEM UNTIL IT HAS BEEN REIMBURSED THE AMOUNT EXPENDED BY IT IN PROCURING THE LEGAL TITLE, IS NOT WITHIN THE REASON OF THE ORDINARY RULE THAT ONE WHO SEEKS EQUITY MUST DO EQUITY; AND, IF SUSTAINED, WOULD INTERFERE WITH THE PROMPT AND EFFICIENT ADMINISTRATION OF THE PUBLIC DOMAIN. Let the wrongdoer first restore what it confesses to





have obtained from the Government by means of a fraudulent scheme formed by its officers, stockholders, and employees in violation of law.

In *United States v. Minor* (114 U. S., 233) there was certified to the Supreme Court of the United States, among other questions, the following:

IV. When the United States files a bill to vacate a patent, on the ground that it was fraudulently obtained upon false testimony, as alleged in said amended bill, whether it is necessary to offer in the bill to return the purchase money paid for the land by the patentee?

This question was answered in the negative without a word of comment (p. 244).

It is true that there is a difference in fact between one who acquires land directly from the Government and one who acquires land from an Indian allottee as to which there is a restriction upon alienation. But the same principle is controlling in both instances. Congress has said upon what terms and under what conditions land may be transferred, and it would be idle to contend that its control remains in one case and not in the other. That the United States has the right to invoke the aid of the courts to set aside patents for and conveyances of land obtained in violation of law has been decided in—

*United States v. Minor*, 114 U. S., 233;  
*Moore v. Robbins*, 96 U. S., 530;  
*United States v. Hughes*, 11 How., 552;  
*United States v. Atherton*, 102 U. S., 372;  
*Moffat v. United States*, 112 U. S., 24;  
*Mullan v. United States*, 118 U. S., 271.

And it is confidently contended that while the property rights of the United States must be determined by the same rules applicable to other litigants, it does not necessarily follow that the same remedy, procedure, or relief will be given by the courts to one as to the other. And a striking illustration of this contention is found in the fact that the highest court of the land has repeatedly declared the right of the United States to recover land taken up without authority of law, and yet Congress has never appropriated a penny for the tender of the money received by it as the purchase price of such lands.

The Constitution of the United States provides:

No money shall be drawn from the Treasury, but in consequence of appropriations made by law. (Constit., Art. I, sec. 9, cl. 7.)

And the fact that there is no provision in the law whereby money can be obtained from the Treasury to tender the purchase money received by the Government indicates the legislative intention that no offer to repay should be required. The Federal law is supreme and must control.

This is the law as laid down in the case of the *State of Texas v. Snyder* (66 Tex., 687). If any authority in addition to that contained in the case of *United States v. Trinidad Coal Company* is needed it will be found in this case. That was a suit brought by the State of Texas to recover school lands alleged to have been purchased from the State in violation of its laws. It was therein held:





(1) That in an action by the State to recover possession of such school lands it is not necessary to a recovery that the State should tender a repayment of that portion of the purchase money already paid;

(2) That it will be conclusively presumed in the absence of a statute authorizing suit against the State that it fully recognizes every just claim a citizen defendant has against it, that in its own way it will do justice in regard thereto, and that it has the ability to do so. The reasons for enforcing the equitable rule which requires a tender to repay purchase money received by one who seeks a rescission of the contract of sale do not exist;

(3) That the provision of the State constitution that no money shall be drawn from the treasury but in pursuance of specific appropriation made by law and the fact that there is no provision of law whereby such purchase money could be obtained from the treasury indicate the legislative intent that no tender to repay should be required;

(4) That though it is true that where the State becomes a litigant in its own courts its rights must be determined by the same rules applicable to other litigants, it does not, therefore, follow that the same remedy, procedure, or relief will be given by the courts to one as to the other;

(5) That courts have no authority to enforce claims against the Government, in whatever form of action they may be urged, unless the institution of such action, or the recognition of such claim, has been expressly sanctioned by law;

(6) That though as a general rule in a suit brought by the State the court has power to adjust equities growing out of the subject-matter of a suit, this rule does not apply to the extent of requiring the State in an action brought by it to recover land, to tender back purchase money received as a prerequisite to having its rights adjudicated when the law has made no provision for obtaining money from the treasury.

*United States v. White et al.* (17 Fed., 561), holding tender to be necessary, was overruled by the *Trinidad* case. In *United States v. Budd et al.* (43 Fed., 630), the patent was alleged to have been issued for land other than that contemplated by the statute; it was decided that the allegations were not proved and the court observed that as no fault on the part of the patentee was alleged, the bill should have contained an offer to return the purchase money.

Nor does the reason of the rule apply to a sovereign government. It is stated to be as follows:

The purpose of the rule requiring an offer in the bill to do equity by placing the defendant as nearly as possible *in statu quo* has been stated to be to test the good faith of the complainant, to require that he purge himself as far as possible of the guilt of complicity in the unlawful transaction by declaring his purpose and readiness to do equity by restoring as far as is in his power the other party to his original status. (18 Pl. & Pr., 830.)

#### THE GOVERNMENT AS GUARDIAN.

(3) *No equity can be created in a party who enters into a void transaction where the transaction is forbidden by a public law or treaty.*





It will be remembered that in *Beck v. Flourney Live-Stock & Real-Estate Company* (65 Fed., 30) the company had attempted to enjoin the defendant, who was the Indian agent, from interfering with the occupancy by the company and its sublessees of the Indian allotments to which it had secured leases, which leases were declared void by the statute. Quoting from the decision of Judge Thayer therein, page 37:

The company appears to have been organized for the express purpose of obtaining leases of lands situated within the reservation that had been or might be allotted to members of the Winnebago tribe of Indians. It appears to have embarked in the enterprise of securing the leases with full knowledge that it was an unlawful undertaking, and that the Government would dispute the validity of whatever leases it might succeed in obtaining from the Indians. In other words, the company deliberately took the chances of violating the law, in the belief, no doubt, that the Government of the United States would be powerless to recover possession of the demised premises, if possession was actually acquired, except by bringing a multitude of suits in ejectment. This is the position now assumed by the appellee. It asserts with great confidence that the Government must be treated as a private landowner; that it can only recover the possession of the leased lands by bringing suits in ejectment. It is fair to infer, therefore, that the real estate company intended at the outset to assume that position and to rely upon that defense. It is also fair to infer that it was led to embark in the enterprise of leasing the lands in the belief that a suit in ejectment would prove a barren remedy

and that the law might be violated with impunity. Under these circumstances it is clear, we think, that a court of equity should not interfere, at the instance of the appellee, to arrest any action that the Government of the United States may take to vindicate its rights. It should leave the appellee in the condition in which it has deliberately placed itself, AND REQUIRE IT TO SEEK REDRESS IN A COURT OF LAW FOR WHATEVER DAMAGE IT MAY SUSTAIN IN CONSEQUENCE OF ANY WRONGFUL ACT COMMITTED BY GOVERNMENT OFFICERS IN EJECTING IT FROM THE DEMISED PREMISES, IF ANY SUCH WRONGFUL ACT IS IN FACT COMMITTED. We will certainly not presume that the executive department of the Government intends to adopt any unlawful means to regain possession of the demised premises. But, be this as it may, it is not within the legitimate province of a court of equity to assist a wrongdoer, like the appellee, in retaining the possession of property which it has acquired in open violation of an act of Congress, when the party against whom relief is sought is an officer of the United States who is acting under the direction and control of the Secretary of the Interior.

And in *Pilgrim v. Beck* (69 Fed., 895), which was a suit similar in character to *Beck v. Live Stock Company* (*supra*), the court, at page 898, lays down this doctrine:

When the leases of the allotted lands were taken, the Flournoy Company, and all others following its example, knew that, under the express provisions of the acts of Congress providing for the allotments in severalty, an absolute restriction against alienation by the allottees was enacted, and all power to contract about the same was denied, until the





lapse of the 25 years of occupancy provided for in the statutes. These parties knew, therefore, that the leases obtained from the Indians were wholly void, and absolutely worthless. When the present bill was filed the decision of the court of appeals in the case brought by William H. Beck et al. against the Flourney Live-Stock and Real-Estate Company had been rendered, in which it was held that these leases were void; the opinion in that case having been filed December 10, 1894. Under these circumstances, it must be held that when this bill was filed the complainants knew that the leases under which they held had been taken, *not only without authority of law, but in absolute defiance of the express provisions of the acts of Congress*; that the invalidity thereof had been judicially adjudged by a court of competent jurisdiction; that the continued occupancy of the lands by the tenants was without warrant of law, and was in direct conflict with the control over these lands vested in the Interior Department of the Government. THIS BEING TRUE, IT FOLLOWS THAT NO EQUITY IS CREATED IN COMPLAINANTS BY THE FACT THAT THEY HAVE CULTIVATED THESE LANDS DURING THE SEASON OF 1895 WHICH JUSTIFIES THE COURT IN SUSTAINING THE PRESENT BILL FOR THEIR BENEFIT. It may be true that many of the subtenants have been in fact misled by the representations made by the Flourney Company, or its officers, in regard to their rights, and that they have relied thereon, but such representations are not chargeable against the United States. THE BILL NOT ONLY WHOLLY FAILS TO SHOW ANY LEGAL RIGHT TO THE OCCUPANCY OF THESE LANDS ON PART OF THE COMPLAINANTS, BUT IN FACT AFFIRMATIVELY SHOWS THAT THIS

OCCUPANCY, AND THE LEASES UPON WHICH IT IS BASED, ARE HELD IN VIOLATION OF THE LAWS OF THE UNITED STATES, AND IN OPEN DEFIANCE OF THE AUTHORITY OF THE UNITED STATES OVER A SUBJECT-MATTER WITHIN THE PARAMOUNT CONTROL OF THE NATIONAL GOVERNMENT; AND THERE IS NO GROUND UPON WHICH THE COURT CAN GIVE ANY CONSIDERATION TO THE FACT THAT THE COMPLAINANTS HAVE PLANTED AND CULTIVATED THE CROPS NOW GROWING ON THESE LANDS. THE MANAGEMENT AND CONTROL OF THESE LANDS FOR THE BENEFIT OF THE INDIANS IS IN THE HANDS OF THE DEPARTMENT OF THE INTERIOR, AND IT IS FOR THE OFFICIALS OF THAT DEPARTMENT TO GIVE WEIGHT TO ANY EQUITIES OR CONSIDERATIONS OF HARDSHIP THAT MAY EXIST IN FAVOR OF ANY OF THE COMPLAINANTS HEREIN. The Indian agent, acting under the instructions of the Department, is charged with the duty of protecting the interests of the Indians, and it is not for the court to interfere with his action on the ground of hardship to the complainants.

And this principle has been enforced by State courts as to treaties entered into and laws enacted by the Federal Government. In *Clark v. Akers* (16 Kans., 166), an action of ejectment was brought by Clark against Akers and others for the recovery of certain real estate which had been conveyed by an Ottawa Indian allottee without the consent of the Secretary of the Interior. After the restriction had been removed the allottee executed another deed to another grantee and an action of ejectment was brought by the second grantee against the first. The court held the first deed absolutely void and declared that the payment of the purchase money by the





grantee created no equity in his favor, because he had entered into a transaction which was void under a public treaty. At page 171 it is said:

We agree with the court below that "A deed made by an Ottawa Indian at any time prior to July 16, 1867, without the consent of the Secretary of the Interior, was absolutely void, and could not create even an equitable interest in the land in favor of the grantee, even though he had paid the purchase money and taken actual possession." Or, as stated in the second set of findings, "A deed made by an Ottawa Indian of land allotted and patented to him under the treaty of 1862, conveying such land to another Ottawa Indian at any time prior to July 16, 1867, without the consent of the Secretary of the Interior, WAS ABSOLUTELY VOID, AND COULD NOT CREATE EVEN AN EQUITABLE ESTATE IN THE LANDS IN FAVOR OF THE GRANTEE, EVEN THOUGH HE HAD PAID THE PURCHASE MONEY." And therefore we think the said deeds "E" and "F" were wholly void. They were void not because of any accident, or mistake, or oversight, or irregularity in their execution, but they were void because of a want of power in Early to alienate or incumber his land in any manner or form except with the consent of the Secretary.

*Sheldon v. Donohoe* (40 Kans., 346), was a case in which Donohoe made a deed purporting to convey to Sheldon a tract of land which, under a treaty of the United States with the Chippewa Indians (12 Stat., 1105), could not be by him alienated, leased, or otherwise disposed of, except to the United States or to some member of the same tribe. Sheldon was not within the terms of the treaty. He paid Donohoe a part of the purchase price and held possession of the

land for about sixteen years, when Donohoe again came into possession. In an action of ejectment by Sheldon against Donohoe to recover the land the deed was held to be void and the court, following *Clark v. Akers*, held that Sheldon could not acquire any equity by reason of the fact that he had paid all of the purchase money. At page 349 the court says:

By the paramount Federal law he was prohibited from taking the title, and therefore he can not indirectly build up one by adverse possession, estoppel, or any statute of limitations. (*Stevens v. Smith*, 2 Kans., 243; *Stone v. Young*, 4 id., 17; *Pennock v. Monroe*, 5 id., 578; *Clark v. Akers*, 16 id., 166; *Maynes v. Veale*, 20 id., 374; *McGannon v. Straightlege*, 32 id., 524.) It is true that Sheldon paid Donohoe a considerable sum of money which has not been returned, and this fact would weigh greatly in favor of Sheldon under other circumstances and if he was not barred from acquiring title. IT HAS BEEN EXPRESSLY RULED, HOWEVER, THAT A CONVEYANCE MADE IN VIOLATION OF A TREATY WILL NOT EVEN CREATE AN EQUITABLE ESTATE IN THE GRANTEE, ALTHOUGH HE MAY HAVE PAID ALL THE PURCHASE MONEY, AND HAVE TAKEN ACTUAL POSSESSION OF THE LAND. (*Clark v. Akers*, 16 Kans., 166.) In this instance Sheldon enjoyed the use and possession of an improved farm for about sixteen years for the money paid, and then, again, it is manifest that both parties understood that the sale and conveyance were contrary to law, as the note and mortgage given for the balance of the purchase money stipulated for the making of a lawful deed at a future time, when Donohoe and wife should be legally able to do so.





Where a wife became surety for her husband, giving a mortgage on her lands to secure her husband's debt, and such suretyship was forbidden by a public statute (see Code of Alabama, 1896, secs. 25-29), the mortgage being absolutely void by reason of the statute, the wife was permitted to cancel the mortgage as a cloud on her title without being required to tender the payment of the mortgage debt. (*Richardson v. Stephens*, 25 So. Rep., 39.) And yet another reason exists, at least in case where the land itself has been conveyed by deed and has been occupied for some length of time. The allottee would be entitled to a fair rental for the time during which the vendee had so occupied the land, but that rental value must be determined judicially. How, then, could the amount of tender be determined in advance? In many instances the amount paid to the Indian allottee is grossly inadequate and the rental value for a short time would greatly exceed the consideration passing to the Indian. As said in *State of Texas v. Snyder* (*supra*), at page 698:

The rule which requires a vendor to return the purchase money paid when he asks rescission at the hands of a court of equity has foundation in the desire of courts of equity to protect all parties, and when its enforcement is not called for by the case presented, or where the enforcement of the rule is not necessary to the protection of the person against whom equitable relief is sought, then it is not enforced. Cases arise in which the use and

occupation of land, sold under circumstances which justify rescission, will equal in value the sum paid by the vendee, and in such cases it would not be necessary to tender or repay the purchase money so paid, and a court of equity would adjust the equities of the respective parties. (*Terrell v. De Witt*, 20 Tex., 260; *McCarty v. Mooder*, 50 Tex., 287; *Clay v. Hart*, 49 Tex., 436.)

If further reasons were required for failure to offer to tender the purchase money they could readily be found in the rule of law which declares that where the plaintiff by reason of his poverty is unable to restore the purchase money, an averment in the bill to that effect will take the place of the tender. Quoting from 18 Pl. & Pr., page 832:

There is a possible exception to the rule that the plaintiff must allege that he has returned, or in his bill must offer to return, the consideration received by him, where the plaintiff by reason of his poverty is unable to restore; but such inability must, it would seem, be alleged in the bill. (*Bowden v. Achor*, 95 Ga., 243; *Strodder v. Southern Granite Company*, 94 Ga., 626.)

In 18 Pl. & Pr., page 834, rescission and cancellation of contracts, under the subhead "Offer to do equity," it is laid down that no offer to restore or to place the defendant in *statu quo* is necessary where the contract is absolutely void. The text is supported by the case of *Kelly v. Owen* (120 Cal.,) 502, in which the court said, at page 510:

There are exceptional cases where restoration or an offer to restore before suit brought





is not necessary, as, for instance, where the thing received by the plaintiff is of no value whatever to either of the parties \* \* \* or where the contract is absolutely void.

(4) *A vendee who has notice of the vendor's incapacity to convey is not entitled to the return of purchase price upon avoidance of the contract.*

In these cases the incapacity of the allottees to convey or to encumber their lands arises through public treaties, agreements, and laws of Congress, with knowledge of which the public is charged; hence the case would seem to come within the principle that a purchaser with notice of a defective title or of the incapacity of the vendor to convey must stand by his bargain and is not entitled to return of the purchase price upon avoidance of the contract. It may have been the intention of the parties that the purchaser should assume the risk of the title and that in many cases must be assumed from the nature of the transaction. Unlike a sale of chattels, where possession is the only evidence of title, and in most cases the only evidence the purchaser can obtain, no warranty can be implied; the title of land depends upon writings, presumably of equal access to either; and of these writings one party is as able to judge as the other. In these cases the incapacity of the vendor to convey was apparent from treaties, agreements, and laws, the existence of which was not only known, but notoriously so. It may, therefore, well be assumed that

the vendees bargained with the vendors upon the invalidity of those treaties, agreements, and laws and that they assumed the risk. Authority for this doctrine may be found in

Warvelle on Vendors, vol. 2, page 1094.

18 Col. Rep., 433.

30 La. Ann., 353.

119 Mich., 343.

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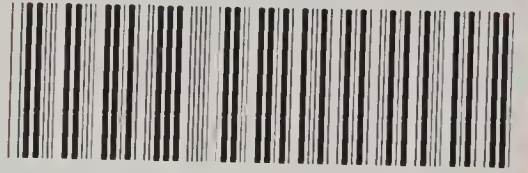








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